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NFIB V. SEBELIUS AND THE TRANSFORMATION OF THE TAXING POWER

Barry Cushman*

ABSTRACT

In National Federation of Independent Business v. Sebelius, Chief Justice Roberts wrote for a majority of five Justices in holding that the “shared responsibility payment” required by the Patient Protection and Affordable Care Act (“ACA”) constituted an imposition of a “tax” rather than a “penalty.” Thus, even though the Chief Justice and four other Justices had concluded that the provision was not a legitimate exercise of the commerce power, the Court held that it was a valid exercise of the taxing power.

The origin of the distinction between taxes and penalties in taxing power jurisprudence is found in the 1922 decision of Bailey v. Drexel Furniture Co., more commonly known as the Child Labor Tax Case. There the Court invalidated a provision of the Revenue Act of 1918 imposing an excise of ten percent on the net profits of all firms employing children under specified ages in various tasks, for longer than specified hours, or at night work. The Child Labor Tax Case was followed in other, similar cases in the 1920s and 1930s, and the Court continued to treat those precedents as good law throughout the remainder of the twentieth century.

Chief Justice Roberts did not reject the authority of the Child Labor Tax Case. Instead, he reviewed the features of the Child Labor Tax that had prompted Chief Justice Taft and his colleagues to conclude that the measure imposed a regulatory penalty, and then offered several distinctions between the ACA and the earlier exaction. But a review of the reaction of child labor reformers to the 1922 decision suggests that contemporaries would not have regarded those distinctions as constitutionally significant. For child labor advocates in the 1920s did not believe that if they revised the measure to remove those objectionable features, the tax would then pass constitutional

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muster. Instead, they regarded the idea of such a constitutional excise as hopeless, and turned their attention to an unsuccessful effort to amend the Constitution to permit Congress to enact federal child labor legislation.

This Article proceeds as follows: Part I provides an overview of the relevant twentieth-century taxing power precedents. Part II reviews the decisions of the lower federal courts concerning the construction and constitutionality of the ACA as a taxing measure. Part III canvasses the arguments made in the briefs submitted to the Court, observing that the decisive taxing power issue received scant attention from the parties. Part IV scrutinizes Chief Justice Roberts's efforts to distinguish the Child Labor Tax Case, concluding that if the assessment of that decision by contemporary observers was accurate, each of those distinctions is insufficient. Part V draws on the contemporaneous analysis of Professor Thomas Reed Powell to isolate the core principle emerging from the Child Labor Tax Case and its progeny: that a nominal tax is in fact a regulatory penalty where it imposes an exaction triggered by departure from a detailed and specified course of conduct, and the exaction is sufficiently onerous to induce those engaged in the targeted conduct generally to alter their behavior. Part VI presents an argument, not considered by the Court, that the ACA might be understood to impose a regulatory penalty so defined. If that understanding is correct, then the Court may have effectively overruled the Child Labor Tax Case and its progeny sub silentio, thereby substantially transforming taxing power doctrine. Part VII explores an alternative, albeit considerably less likely possibility: that contemporary child labor reformers misunderstood the Child Labor Tax Case, and could have successfully revised and defended a new Child Labor Tax by altering one or more of the distinguishing features identified by Chief Justice Roberts. If that is so, then that unfortunate generation of social activists squandered fifteen years in fruitless pursuit of a constitutional amendment authorizing Congress to regulate the labor of children, when a much easier and more expeditious solution lay right before their eyes.

INTRODUCTION

The Supreme Court has revived an old asymmetry in its jurisprudence of enumerated powers. In the late nineteenth century and during the first four decades of the twentieth, Congress frequently sought to achieve regulatory objectives it could not attain through its commerce power by imposing excise taxes designed to discourage disfavored activities.¹ Occasionally these exactions were challenged before the Supreme Court, and the Justices permitted this indirect fiscal regulation of such "local" activities as the production of oleomargarine colored to resemble butter,² the intrastate distribution of narcotics,³ and the intrastate sale of machine guns and sawed-off shotguns.⁴ For decades following the Court's 1942 decision in *Wickard v. Filburn*,⁵ after which the commerce power was commonly thought to be virtually plenary,

1 See R. ALTON LEE, A HISTORY OF REGULATORY TAXATION 1-141 (1973).

2 *McCray v. United States*, 195 U.S. 27 (1904).

3 *United States v. Doremus*, 249 U.S. 86 (1919).

4 *Sonzinsky v. United States*, 300 U.S. 506 (1937).

5 317 U.S. 111 (1942).

this asymmetry in the regulatory scope of these two enumerated powers was effaced. With the more recent decisions in *United States v. Lopez*⁶ and *United States v. Morrison*,⁷ however, the question of whether Congress's reach under its taxing power would again exceed its grasp under the Commerce Clause once again became salient.

To this question we now have our answer. Beginning in 2014, the Patient Protection and Affordable Care Act ("ACA") will require every "applicable individual" who has not secured "minimum essential [health insurance] coverage" to make a "shared responsibility payment" to the Internal Revenue Service.⁸ In *National Federation of Independent Business v. Sebelius*,⁹ five Justices held that this "individual mandate" could not be sustained as an exercise of the commerce power. Another group of five Justices, however, held that the provision was a valid exercise of Congress's Article I, Section 8 power to "lay and collect Taxes, Duties, Imposts and Excises."¹⁰ The deciding vote in each instance was cast by Chief Justice Roberts.

No lower federal court had upheld the mandate as a tax,¹¹ and the parties understandably lavished considerably more attention on the Commerce Clause issue, which they anticipated would be decisive. As a taxing power case, the challenge to the ACA presented two distinct issues that often seemed to bleed together. The first was an issue of statutory construction: whether the language of the statute, which purported to rely upon the commerce power rather than the taxing power, expressed the regulatory objective of inducing people to purchase insurance rather than a fiscal purpose to raise revenue, and referred to the payment as a "penalty" rather than as a "tax," could properly be construed to impose a tax. The second issue was whether, assuming that the statute's language was properly so construed, the measure imposed a true tax rather than a penalty for purposes of constitutional analysis. The second issue, in other words, was this: suppose that we were to imagine that in enacting the statute Congress had purported to rely on its taxing power rather than on its commerce power, had expressed no regulatory objective but instead had stated that the law's purpose was to raise revenue, and had termed the payment a "tax" rather than a "penalty." Under those circumstances, would the exaction be a tax within the meaning of Article I of the Constitution?

The lower federal courts uniformly had concluded that the mandate could not properly be construed to impose a tax,¹² and the dissenting Justices in *Sebelius* agreed that several of the statute's features precluded such a construction.¹³ Chief Justice Roberts, by contrast, offered a generous "saving

6 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

7 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act).

8 26 U.S.C. § 5000A (Supp. V 2011).

9 132 S. Ct. 2566 (2012).

10 U.S. CONST. art. I, § 8, cl. 1.

11 See *infra* Part II.

12 See *infra* Part II.

13 *Sebelius*, 132 S. Ct. at 2650–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

construction” of the statute as a tax,¹⁴ leaving the dissenters astonished and indignant.¹⁵ As to the second issue, both Chief Justice Roberts and the dissenting Justices critically agreed on the test to be applied. Each of them relied upon a definition articulated by Justice Sutherland in a Double Jeopardy case decided in 1931.¹⁶ “A tax,” Sutherland explained, “is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.”¹⁷ Employing this test, the question was whether the ACA made the failure to acquire qualifying health insurance unlawful. The dissenters concluded that it did;¹⁸ Chief Justice Roberts concluded that under the ACA it was perfectly legal not to secure such insurance, so long as one paid the tax imposed for failing to do so.¹⁹

This should not have been the end of the matter, for there were decisions that both Chief Justice Roberts and the dissenting Justices recognized as good authority in which the Court had declared a putative tax to be a regulatory penalty even though the conduct triggering the tax was not unlawful. Indeed, one finds the very genesis of the tax/penalty distinction in just such a case: the 1922 decision of *Bailey v. Drexel Furniture Co.*, more commonly known as the *Child Labor Tax Case*.²⁰ There the Court had invalidated a provision of the Revenue Act of 1918 imposing an excise of ten percent on the net profits of all firms employing children under specified ages in various tasks, for longer than specified hours, or at night work.²¹ The *Child Labor Tax Case* was followed in other, similar cases in the 1920s and 1930s, and none of these decisions has been formally overruled.²²

Chief Justice Roberts did not ignore the *Child Labor Tax Case*. He reviewed the features of the Child Labor Tax that prompted Chief Justice Taft and his colleagues to conclude that the measure imposed a regulatory penalty, and then offered several distinctions between the ACA and the earlier exaction.²³ But a review of the reaction of child labor reformers to the 1922 decision suggests that contemporaries would not have regarded those distinctions as constitutionally significant. For child labor advocates in the 1920s did not believe that if they revised the measure to remove those objectionable features, the tax would then pass constitutional muster. Instead, they regarded the idea of such a constitutional excise as hopeless, and turned

14 *Id.* at 2593–94 (majority opinion).

15 *Id.* at 2650–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

16 *Id.* at 2596 (majority opinion); *id.* at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

17 *United States v. La Franca*, 282 U.S. 568, 572 (1931).

18 *Sebelius*, 132 S. Ct. at 2652–54 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

19 *Id.* at 2493–94, 2597 (majority opinion).

20 259 U.S. 20 (1922).

21 Revenue Act of 1918, Pub. L. No. 65-254, § 1200, 40 Stat. 1057, 1138 (1919).

22 See *infra* Sections I.B-C.

23 *Sebelius*, 132 S. Ct. at 2595–96.

their attention to an unsuccessful effort to amend the Constitution to permit Congress to enact federal child labor legislation.²⁴

This Article proceeds as follows: Part I provides an overview of the relevant twentieth-century taxing power precedents. Part II reviews the decisions of the lower federal courts concerning the construction and constitutionality of the ACA as a taxing measure. Part III canvasses the arguments made in the briefs submitted to the Court, observing that the decisive taxing power issue received scant attention from the parties. Part IV scrutinizes Chief Justice Roberts's efforts to distinguish the *Child Labor Tax Case*, concluding that if the assessment of that decision by contemporary observers was accurate, each of those distinctions is insufficient. Part V draws on the contemporaneous analysis of Professor Thomas Reed Powell to isolate the core principle emerging from the *Child Labor Tax Case* and its progeny: that a nominal tax is in fact a regulatory penalty where it imposes an exaction triggered by departure from a detailed and specified course of conduct, and the exaction is sufficiently onerous to induce those engaged in the targeted conduct generally to alter their behavior. Part VI presents an argument, not considered by the Court, that the ACA might be understood to impose a regulatory penalty so defined. If that understanding is correct, then the Court may have effectively overruled the *Child Labor Tax Case* and its progeny *sub silentio*, thereby substantially transforming taxing power doctrine. Part VII explores an alternative, albeit considerably less likely possibility: that contemporary child labor reformers misunderstood the *Child Labor Tax Case*, and could have successfully revised and defended a new Child Labor Tax by altering one or more of the distinguishing features identified by Chief Justice Roberts. If that is so, then that unfortunate generation of social activists squandered fifteen years in fruitless pursuit of a constitutional amendment authorizing Congress to regulate the labor of children, when a much easier and more expeditious solution lay right before their eyes.

I. THE PRECEDENTS

The distinction between a true tax and a regulatory penalty may seem obscure, because until recently it may have seemed like little more than a remote artifact of the constitutional law of the early twentieth century. A review of the relevant precedents therefore may better enable us to appreciate their bearing on the Court's recent decision upholding the individual mandate. This line of doctrinal development is sometimes understandably characterized as marked by inconsistency and discontinuity.²⁵ One aim of this and subsequent sections is to caution against exaggeration in this regard, and to identify the principle that lent unity to this body of doctrine.

24 See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 2 (1957) ("The decision put an end for nearly a generation, until late in the New Deal, to federal efforts to help abolish child labor." (footnote omitted)).

25 See, e.g., Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1210–18 (2012).

A. Early Decisions

In *Veazie Bank v. Fenno*,²⁶ decided in 1869, the Supreme Court unanimously upheld a federal excise of ten percent on the issuance of state bank notes. The law was clearly designed to tax state bank notes out of circulation, and the Court sustained the tax as a valid exercise of Congress's monetary power to establish and regulate a sound and uniform national currency.²⁷ But Chief Justice Chase's opinion also maintained that the statute could be upheld as an exercise of the taxing power.²⁸ The foundation for this conclusion was a conception of the separation of powers that would permeate subsequent taxing power decisions. "[T]he judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers," Chase wrote. "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."²⁹

It was this conception that drove the Court's 1904 decision in *McCray v. United States*.³⁰ There the Court, by a vote of 6-3, upheld a statute that imposed a tax at a rate of one-fourth of a cent per pound on uncolored oleomargarine, but at a rate of ten cents per pound where the oleomargarine was colored to resemble butter.³¹ There was no doubt that the tax was designed to discourage the production of oleomargarine colored so that it would compete with butter.³² The report of the Senate Committee on Agriculture and Forestry frankly admitted that the bill's purpose was "to encourage the sale of the genuine article and to discourage the fraudulent sale of the imitation article, and to protect the honest producer, dealer, and consumer of both butter and oleomargarine."³³ The House Committee on Agriculture Report similarly confessed that

[t]he object sought by the legislation . . . is to provide the best means of protecting the public against imposition in the sale of oleomargarine in guise and under the name of butter, and at the same time protect the producer of the genuine article in the full enjoyment of the market to which he

26 75 U.S. 533 (1869).

27 *Id.* at 548-49.

28 *Id.* at 547-48.

29 *Id.* at 548.

30 195 U.S. 27 (1904).

31 Act of May 9, 1902, Pub. L. No. 57-110, 32 Stat. 193, 194; *McCray*, 195 U.S. at 28.

32 See, e.g., A.J. Englehard, *Constitutional Law—Taxation—Child Labor Tax Law*, 2 WIS. L. REV. 53, 54 (1922) ("[I]t was common knowledge that the purpose of the tax was to absolutely suppress the sale of colored butterine . . ."); Herbert F. Margulies, *Federal Police Power by Taxation: McCray v. United States and the Oleomargarine Tax of 1902*, 5 J. S. LEGAL HIST. 1, 1 (1997) (explaining that the oleomargarine tax was passed "at the behest of dairy-men" so "consumers would drastically curtail their buying of colored oleomargarine"); William E. Burby, Note, *Constitutional Law—Tax on Employment of Child Labor*, 21 MICH. L. REV. 88, 88 (1922) ("It was known that the passage of [the Oleomargarine Tax] was to protect the dairy interests and destroy the oleomargarine industry.").

33 S. REP. NO. 57-530, at 1 (1902).

is justly and honestly entitled as a result of the general demand upon the part of the public for his product.³⁴

“[S]tringent measures” were “necessary for the protection of the public and producers of butter against fraud in the sale of oleomargarine,” and “only the burdening of the counterfeit or imitation article with a heavy tax, taking from it the large profit that is the incentive to its fraudulent sale as butter,” could “successfully correct the flagrant abuses accompanying its sale.”³⁵ The Senate Committee’s Minority Report charged that

[t]he advocates of this proposed legislation admit that their object is to place the tax on oleomargarine so high that it can not be placed upon the markets of the country if colored. . . . The object . . . of imposing this excessive tax of 10 cents a pound upon colored oleomargarine is not for the purpose of raising revenue, but for the purpose of prohibiting its manufacture, and of thus destroying the industry.³⁶

The bill was thus “not a revenue measure.”³⁷

Chief Justice White’s analysis of the taxing power issue treated the question as if it were wholly controlled by separation of powers concerns. As White understood *McCray*’s argument, he was contending that

because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused.³⁸

White recoiled from the proposition that the judiciary should intervene to prevent such a pretextual exercise of an enumerated power, an exercise of a “lawful power . . . for an unlawful purpose.”³⁹ As White saw it, *McCray*’s claim “reduce[d] itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.”⁴⁰ That proposition, White worried,

if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions.⁴¹

White quoted at length from judicial paeans to separation of powers, and worried aloud about “judicial usurpation” overthrowing “the entire dis-

34 H.R. REP. NO. 57-255, at 2 (1902).

35 *Id.* at 3.

36 S. REP. NO. 57-530, pt. 2, at 3 (1902).

37 *Id.* at 4.

38 *McCray v. United States*, 195 U.S. 27, 54 (1904).

39 *Id.*

40 *Id.*

41 *Id.* at 54–55.

inction between the legislative, judicial[,] and executive departments of the government, upon which our system is founded.”⁴² He recognized that the lack of judicial authority to invalidate the exercise of an enumerated power animated by “a wrong[ful] motive or purpose” might result in “temporarily effectual” “abuses of a power conferred.”⁴³ But he insisted, as *Veazie Bank* had maintained, that the remedy lay “not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.”⁴⁴

The Court was thus powerless to inquire into “the motive or purpose of Congress” in enacting the measure, and it was “self-evident” that the statute on its face levied an excise tax.⁴⁵ It therefore followed that the Act was “within the grant of power.”⁴⁶ The contention that enforcement of the Act would “destroy or restrict the manufacture of artificially colored oleomargarine” was entirely irrelevant.⁴⁷ Because “the taxing power conferred by the Constitution” knew “no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.”⁴⁸ The incidental effects that such taxation might have on matters otherwise subject to state regulatory authority did not impugn the validity of the tax.⁴⁹

United States v. Doremus,⁵⁰ decided in 1919, involved a constitutional challenge to the Harrison Act of 1914.⁵¹ Section 1 of the Act required persons who produced, imported, or transferred opium or cocoa leaves or any compound, derivative or preparation thereof to register with the collector of internal revenue in his district.⁵² At the time of registration, all such persons were required to pay to the collector a special annual tax of \$1.00.⁵³ It was made unlawful for any person required to register under the Act to engage in any of the enumerated drug-related activities without having registered and paid the special tax.⁵⁴ Section 2 made it unlawful for any person to transfer any of the listed drugs except pursuant to a written order of the person to whom the drugs were so transferred, “on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.”⁵⁵ Anyone transferring

42 *Id.* at 54.

43 *Id.* at 55.

44 *Id.*

45 *Id.* at 59.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 59–60.

50 249 U.S. 86 (1919).

51 Act of Dec. 17, 1914, Pub. L. No. 63-223, 38 Stat. 785.

52 *Id.* at 785.

53 *Id.*

54 *Id.* at 786.

55 *Id.*

any of the listed drugs was required to preserve the order for a period of two years so that it could be inspected by agents of the Treasury Department.⁵⁶ The statute created exemptions for dispensations to a patient by a physician in the course of his professional practice, and by pharmacists pursuant to prescriptions from a treating physician, so long as proper records of such prescriptions were preserved.⁵⁷

Doremus was a physician who had duly registered and had paid the special tax required by the first section of the Act.⁵⁸ He was charged with unlawfully distributing heroin to a known addict without the written order required by Section 2 of the Act.⁵⁹ The indictment charged that Doremus did not distribute the heroin in the course of his regular professional practice, nor for the treatment of any disease from which the addict was suffering, but instead “for the purpose of gratifying [the addict’s] appetite for the drug as an habitual user thereof.”⁶⁰ Doremus demurred to the indictment, and the district court ruled in his favor on the ground that the Act was “not a revenue measure,” but was instead “an invasion of the police power reserved to the States.”⁶¹

The Court upheld the Act by a vote of 5-4, reaffirming the principles established in *Veazie Bank* and *McCray*. “[F]rom an early day,” wrote Justice Day for the majority,

the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.⁶²

The fact that “the same business may be regulated by the police power of the State” was irrelevant, for an exercise of the taxing power “may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue.”⁶³ The “decisive question,” therefore, was whether Sections 1 and 2 of the Act had “any relation to the raising of revenue.”⁶⁴ It could not be “successfully disputed” that Congress had power to levy the excise imposed on opium dealers in Section 1, which “specifically provid[ed] for the raising of revenue.”⁶⁵ And the Court could not agree that the provisions of Section 2 had “nothing to do with facilitating the collection of the revenue” sought by Section 1.⁶⁶ Those provisions aimed “to

56 *United States v. Doremus*, 249 U.S. 86, 91 (1919).

57 *Id.* at 88, 91–93.

58 *Id.* at 90.

59 *Id.*

60 *Id.*

61 *Id.* at 89.

62 *Id.* at 93.

63 *Id.* at 93–94.

64 *Id.* at 94.

65 *Id.*

66 *Id.* at 95.

keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue.”⁶⁷ They accordingly tended “to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax.”⁶⁸ “Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.”⁶⁹

The tax in *Doremus* was sustained by the narrowest of margins, and the dissenting Justices were led by the author of *McCray* himself. Chief Justice White noted that he

dissents because he is of opinion that the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.⁷⁰

White’s dissent, which was joined by Justices McKenna, Van Devanter, and McReynolds, offered tangible evidence that several of the Justices were becoming concerned about Congress’s increasingly aggressive use of the taxing power to achieve regulatory ends.⁷¹

B. *The Child Labor Tax Case and Its Progeny*

Those concerns would inspire an 8-1 majority of the Court to invalidate the Child Labor Tax just three years later. In 1916, Congress had passed the Keating-Owen Act,⁷² which prohibited the interstate shipment of articles produced by firms that employed children under the age of sixteen in mines or quarries, or employed children under the age of fourteen in any mill, cannery, workshop, factory, or manufacturing establishment, or employed children between the ages of fourteen and sixteen in this latter category of businesses for more than eight hours per day, or for more than six days in any week, or before the hour of 6:00 a.m., or after the hour of 7:00 p.m.⁷³ In 1918, the Court invalidated the Act in the case of *Hammer v. Dagenhart*,⁷⁴ holding that the statute was not a legitimate exercise of the commerce power.⁷⁵ Relying on the authority of *McCray*, Congress responded by adding a provision to the Revenue Act of 1918 imposing a ten percent excise on the net profits of any firm employing children in violation of any of the standards

67 *Id.* at 94.

68 *Id.*

69 *Id.* at 95.

70 *Id.* (White, C.J., dissenting).

71 *Id.*

72 Act of Sept. 1, 1916, Pub. L. No. 64-249, 39 Stat. 675.

73 *Id.*

74 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

75 *Id.* at 276.

established by the Keating-Owen Act.⁷⁶ That exaction was successfully challenged in the *Child Labor Tax Case*.⁷⁷

The question, as Chief Justice Taft saw it, was “[d]oes this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?”⁷⁸ Taft recognized that if the excise were one “on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax.”⁷⁹ But this act was “more.” It provided “a heavy exaction for a departure from a detailed and specified course of conduct in business.”⁸⁰ If an employer were to depart from “this prescribed course of business, he [was] to pay to the Government one-tenth of his entire net income in the business for a full year.”⁸¹ That amount was “not to be proportioned in any degree to the extent or frequency of the departures,” but was “to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day.”⁸²

Moreover, if the employer did not know that the child was within the specified age limit, he was excused from payment. It was “only where he knowingly departs from the prescribed course that payment is to be exacted.”⁸³ “Scienter,” the Chief Justice explained, “is associated with penalties[,] not with taxes.”⁸⁴ In addition, the employer’s factory was

to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers.⁸⁵

“In the light of these features of the act,” Taft concluded:

a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?⁸⁶

Taft recognized that taxes were “occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous.”⁸⁷ Such measures did not “lose their

76 Revenue Act of 1918, Pub. L. No. 65-254, § 1200, 40 Stat. 1057, 1138 (1919).

77 259 U.S. 20 (1922).

78 *Id.* at 36.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 36–37.

84 *Id.* at 37.

85 *Id.*

86 *Id.*

87 *Id.* at 38.

character as taxes because of the incidental motive.”⁸⁸ Nevertheless, the Chief Justice insisted, “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us.”⁸⁹ The statute’s “so-called tax” was in fact “a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution.”⁹⁰

The Chief Justice conceded that “[o]ut of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us,” he insisted, “the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.”⁹¹

McCray and *Veazie Bank* were distinguished on the ground that “[i]n neither of these cases did the law objected to show on its face[,] as does the law before us[,] the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.”⁹² By contrast, the Child Labor Tax, which did display these features “on the face of the act,” was a “penalty.”⁹³

Taft did not deny that the reduction of child labor was a worthy policy objective. Nevertheless, he maintained that it was “the high duty and function” of the Court “to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress[,] but left or committed by the supreme law of the land to the control of the States,” even where it required the Justices “to refuse to give effect to legislation designed to promote the highest good.”⁹⁴ “The good sought in unconstitutional legislation,” Taft warned, “is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of . . . the harm which will come from breaking down recognized standards.”⁹⁵ “Grant the validity of this law,” the Chief Justice reasoned,

and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word “tax” would be to break

88 *Id.*

89 *Id.*

90 *Id.* at 39.

91 *Id.* at 37–38.

92 *Id.* at 42.

93 *Id.* at 39.

94 *Id.* at 37.

95 *Id.*

down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.⁹⁶

It would constitute a “breach” in “the ark of our covenant,” which had been responsible for the “maintenance of local self government, on the one hand, and the national power, on the other,” and under which the country had “been able to endure and prosper for near a century and a half.”⁹⁷ The case therefore required

the application of the principle announced by Chief Justice Marshall in *McCulloch v. Maryland* . . . : “Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”⁹⁸

Unlike *Hammer*, which was decided by a vote of 5–4, the decision in the *Child Labor Tax Case* was supported by eight of the nine Justices.⁹⁹ Three of the *Hammer* dissenters—Justices McKenna, Holmes, and Brandeis—each joined Taft’s opinion. Justice Brandeis wrote on his return of Taft’s circulated draft opinion, “Yes Sir: You have made this clear & forceful & have done all that can be done to distinguish the earlier cases.”¹⁰⁰ Taft later circulated a “[f]urther revision to meet suggestions of the brethren,” to which Brandeis replied, “Yes. A very good opinion.”¹⁰¹

*Hill v. Wallace*¹⁰² was decided the same day as the *Child Labor Tax Case*. The Future Trading Act of 1921¹⁰³ imposed a tax of twenty cents per bushel on all contracts for the sale of grain for future delivery, but exempted from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture.¹⁰⁴ The Secretary could designate a board as a contract market only if it fulfilled a detailed series of conditions and requirements set forth in the Act.¹⁰⁵ The petitioners argued that the Act “in effect

96 *Id.* at 38.

97 *Id.* at 37.

98 *Id.* at 39–40 (citation omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819)).

99 *Id.* at 44 (noting the dissent of Justice Clarke).

100 Circulated *Child Labor Case* Draft Opinion, *microformed on* William H. Taft Papers, Reel 614 (Libr. of Cong., 1969).

101 *Id.* Alexander Bickel suggested that Brandeis actually suppressed his dissenting views in the *Child Labor Tax Case*, as he sometimes did in other cases, for the “tactical” reason of fostering amicable relations with Taft and his other colleagues in the majority. BICKEL, *supra* note 24, at 18–19. Stephen Wood disagrees, concluding that in the *Child Labor Tax Case* both Holmes and Brandeis voted their convictions that the statute was unconstitutional. STEPHEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA* 286–92 (1968).

102 259 U.S. 44 (1922).

103 Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921).

104 *Id.* § 4.

105 *Hill*, 259 U.S. at 45, 63–64.

prohibits all those who are not members of a board of trade, which has been designated by the Secretary of Agriculture a contract market under [the Act], from making any contracts of sales for future delivery.”¹⁰⁶

The Court unanimously held that these provisions of the Act could not be sustained as an exercise of the taxing power of Congress.¹⁰⁷ Chief Justice Taft concluded that the decision in the *Child Labor Tax Case* “completely covers this case.”¹⁰⁸ Here it was “impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture.”¹⁰⁹ Indeed, the title of the Act recited that one of its purposes was the regulation of Boards of Trade.¹¹⁰ The imposition of a tax of twenty cents per bushel was “most burdensome.”¹¹¹ The Revenue Act imposed a tax on contracts for sales for future delivery of only two cents per \$100 of value.¹¹² The tax imposed by the Future Trading Act, by contrast, varied according to the price and character of the grain from fifteen to fifty percent of its value.¹¹³ The “manifest purpose of the tax” was “to compel boards of trade to comply with regulations,” many of which had “no relevancy to the collection of the tax at all.”¹¹⁴ The Act was thus, “in essence and on its face[,] a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all ‘futures’ to coerce boards of trade and their members into compliance.”¹¹⁵ When this purpose was “declared in the title to the bill,” and was “so clear from the effect of the provisions of the bill itself,” it left “no ground” upon which its provisions could be “sustained as a valid exercise of the taxing power.”¹¹⁶

Carter v. Carter Coal Co.,¹¹⁷ decided in 1936, considered the validity of provisions of the Bituminous Coal Conservation Act of 1935.¹¹⁸ That Act established an elaborate scheme for the creation of a national commission¹¹⁹ which was to promulgate a national Bituminous Coal Code¹²⁰ involving the organization of numerous coal districts, the setting up of numerous boards in the districts, and the fixing of all prices for bituminous coal, and of the wages, hours and working conditions of the miners, throughout the coun-

106 *Id.* at 47.

107 *Id.* at 68.

108 *Id.* at 67.

109 *Id.* at 66.

110 Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187, 187 (1921).

111 *Hill*, 259 U.S. at 66.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 66-67.

117 298 U.S. 238 (1936).

118 Bituminous Coal Conservation Act of 1935, Pub. L. No. 74-402, 49 Stat. 991.

119 *Id.* § 2(a).

120 *Id.* § 4.

try.¹²¹ It also imposed an excise tax of 15% on the sale price or market value at the mine of all bituminous coal produced in the country, but provided that those producers who submitted to the price-fixing and labor provisions of the Code would receive a 90% credit against the tax.¹²² The constitutionality of the Act was successfully challenged in *Carter Coal*. Following the authority of the *Child Labor Tax Case*, the Court held that the “so-called excise tax” was “clearly not a tax[,] but a penalty.”¹²³ It was “not imposed for revenue[,] but exacted as a penalty to compel compliance with the regulatory provisions of the act.”¹²⁴ Indeed, Justice Sutherland observed, “[t]hat the ‘tax’ is[,] in fact[,] a penalty is not seriously in dispute.”¹²⁵ The Government conceded “that the validity of the exaction does not rest upon the taxing power[,] but upon the power of Congress to regulate interstate commerce; and that[,] if the act in respect of the labor and price-fixing provisions be not upheld, the ‘tax’ must fall with them.”¹²⁶

As the historian of regulatory taxation R. Alton Lee observes, these decisions constituted a refinement rather than a rejection of *McCray*. “As if to demonstrate that the [*McCray*] decision had not been overturned in 1922,” Lee notes, “the Supreme Court refused to hear a case ten years later involving a discriminatory tax on ticket scalping.”¹²⁷ The Revenue Act of 1926 had retained a World War I era five percent excise on tickets to places of amusement, “but further provided for an exactment of 50 percent on the resale of tickets on the amount exceeding fifty cents over the price printed on the ticket.”¹²⁸ In 1928 Congress raised the permissible mark-up from fifty to seventy-five cents.¹²⁹ In *F. Couthoui, Inc. v. United States*, the Court of Claims relied upon *McCray* in sustaining the constitutionality of the scalping tax.¹³⁰ The Supreme Court’s denial of certiorari,¹³¹ Lee concludes, “indicated a

121 *Carter*, 298 U.S. at 281–82.

122 *Id.* at 280–81. The House report maintained that, even if every operator in the country submitted to the Code, the tax would still produce \$10 million annually. H.R. REP. NO. 74-1800, at 10 (1935). The minority report argued that the exaction was unconstitutional because its purpose was not to raise revenue, but was instead “a penalty to compel, through direct coercion, the submission as to regulations not otherwise within the power of Congress to enforce.” *Id.* at 46; *see also* 79 CONG. REC. 13,460 (1935) (statement of Rep. Cooper) (arguing that the bill’s taxing provision was “coercive and not for the purpose of raising revenue”); *id.* at 13,484 (statement of Rep. Treadway) (“It is freely admitted by the proponents of the bill that the object of these tax and drawback provisions is not to raise revenue but to impose a penalty on mine operators who do not accept and comply with the provisions of the proposed bituminous-coal code.”); LEE, *supra* note 1, at 154–56.

123 *Carter*, 298 U.S. at 288.

124 *Id.* at 289.

125 *Id.*

126 *Id.*

127 LEE, *supra* note 1, at 138–39.

128 *Id.* at 139.

129 *Id.* at 139–40.

130 *F. Couthoui, Inc. v. United States*, 54 F.2d 158, 161 (Ct. Cl. 1931).

131 *F. Couthoui, Inc. v. United States*, 285 U.S. 548 (1932).

continued adherence to the *McCray* principle.”¹³² *McCray* and the *Child Labor Tax Case* co-existed throughout this period,¹³³ and they would continue to do so.

C. Later Cases

Sonzinsky v. United States,¹³⁴ decided in 1937, involved a challenge to Section 2 of the National Firearms Act of 1934,¹³⁵ which imposed an annual license tax of \$200 on all dealers in firearms. The exaction was essentially a tax on dealers in machine guns, sawed-off shotguns, and silencers—the Act defined a “firearm” as “a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm.”¹³⁶ Sonzinsky argued that the levy was “not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government.”¹³⁷

Justice Stone wrote the opinion upholding the tax.¹³⁸ First, he distinguished the *Child Labor Tax Case* and its progeny. Unlike those cases, Stone pointed out, the National Firearms Act did not contain “regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations.”¹³⁹ The challenged provision contained “no regulation other than the mere registration provisions,” which were “obviously supportable as in aid of a revenue purpose.”¹⁴⁰ The exaction was “[o]n its face . . . only a taxing measure,” and was not a penalty simply “by virtue of its deterrent effect on the activities taxed.”¹⁴¹ Every tax was “in some measure regulatory,” to “some extent” interposing “an economic impediment to the activity taxed as compared with others not taxed.”¹⁴² *Veazie Bank*, *McCray*, and *Doremus* each had established “that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.”¹⁴³ Those cases further established that the Court was not competent to inquire into “the

132 LEE, *supra* note 1, at 140.

133 Margulies, *supra* note 32, at 4 (arguing that the *Child Labor Tax Case* “did not overturn *McCray*, and in fact Chief Justice Taft reconciled the two”).

134 300 U.S. 506 (1937).

135 National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934).

136 *Sonzinsky*, 300 U.S. at 511–12.

137 *Id.* at 512.

138 *Id.* at 511.

139 *Id.* at 513.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

hidden motives which may move Congress to exercise a power constitutionally conferred upon it.”¹⁴⁴ At least where the tax was not “attended by an offensive regulation,” the Court would “not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.”¹⁴⁵ The tax was productive of some revenue, having been paid by twenty-seven dealers in 1934 and by twenty-two in 1935.¹⁴⁶ Because it was “not attended by an offensive regulation,” and “operate[d] as a tax,” it was “within the national taxing power.”¹⁴⁷

Lest we think that *Sonzinsky* constituted a departure from the *Child Labor Tax Case*, it bears emphasis that the decision was unanimous, and was joined by each of the Four Horsemen and by the three remaining members of the majority in the *Child Labor Tax Case*: Justices Van Devanter, McReynolds, and Brandeis. The unanimity of the opinion was deceptive, but only mildly. On the returns of Justice Stone’s circulated opinion, Chief Justice Hughes and Justices Van Devanter, Sutherland, and Roberts all wrote “I agree.” Justices Butler and Cardozo replied with a confirmatory “Yes.” Only the dyspeptic Justice McReynolds wrote disconsolately, “I don’t think so; but if all others do they must prevail though wrong.”¹⁴⁸

United States v. Sanchez,¹⁴⁹ decided in 1950, upheld the Marihuana Tax Act of 1937.¹⁵⁰ That Act was designed to “‘raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses’”¹⁵¹ by “restricting traffic in marihuana to accepted industrial and medicinal channels.”¹⁵² The Act, which clearly was modeled on the Harrison Narcotic Drug Act upheld in *Doremus*, imposed a special tax ranging from \$1 to \$24 on “‘every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana.’”¹⁵³ The statute further required that such persons register at the time of the payment of the tax with the Collector of the District in which their businesses were located, and made it unlawful for any person to transfer marihuana except in pursuance of a written order of the transferee on a blank form issued by the Secretary of the Treasury.¹⁵⁴ At the time he applied for such an order form, the transferee was required to pay a tax of \$1 per ounce if he had paid the special tax and registered, or \$100 per ounce if

144 *Id.* at 513–14.

145 *Id.* at 514.

146 *Id.* at 514 n.1.

147 *Id.* at 514.

148 Returns of opinion in *Sonzinsky v. United States*, 300 U.S. 506 (1937), Box 63, Harlan Fiske Stone MSS, Library of Congress.

149 340 U.S. 42 (1950).

150 Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551.

151 *Sanchez*, 340 U.S. at 43 (quoting S. REP. NO. 75-900, at 3 (1937)).

152 *Id.* at 44.

153 *Id.* at 43 (quoting Marihuana Tax Act of 1937 § 2(a)).

154 Marihuana Tax Act of 1937 §§ 2(e), 6(a).

he had not paid the special tax and registered.¹⁵⁵ The transferor was also made liable for the tax so imposed in the event the transfer was made without an order form and without the payment of the tax by the transferee.¹⁵⁶ In *Sanchez*, transferors who had been subjected to the tax challenged the exaction as an unconstitutional regulatory penalty.¹⁵⁷

Justice Clark wrote for a unanimous Court that the levy was valid notwithstanding its “regulatory effect” and “close resemblance to a penalty.”¹⁵⁸ *Sonzinsky* established that it was “beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed,” “even though the revenue obtained is obviously negligible,” “or the revenue purpose of the tax may be secondary.”¹⁵⁹ Nor did “a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.”¹⁶⁰ As Justice Sutherland had written for a unanimous Court in 1934, two years before the decision in *Carter Coal*, “[f]rom the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.”¹⁶¹ Like those exactions, the Marihuana Tax was “a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect.”¹⁶²

United States v. Kahriger,¹⁶³ handed down in 1953, concerned the constitutionality of the occupational tax provisions of the Revenue Act of 1951, which imposed an excise on persons engaged in the business of accepting wagers, and required such persons to register with the Collector of Internal Revenue. Kahriger, who was charged with willfully failing to register and pay the tax, argued that “Congress, under the pretense of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act and has thus infringed the police power which is reserved to the states.”¹⁶⁴ Justice Reed wrote the opinion rejecting this challenge.¹⁶⁵ The fact that there was “legislative history indicating a congressional motive to suppress wagering” was not fatal, Reed explained, because the “intent to curtail and hinder, as well as tax, was also manifest” in *McCray*, *Doremus*, *Sonzinsky*, and *Sanchez*, and in each of those cases the tax had been upheld.¹⁶⁶ It was “conceded that a federal excise tax does not cease to be

155 *Id.* § 7(a)(1)–(2).

156 *Id.* § 7(b).

157 *Sanchez*, 340 U.S. at 43–44.

158 *Id.* at 44.

159 *Id.*

160 *Id.*

161 *Id.* at 44–45 (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934)).

162 *Id.* at 45.

163 *United States v. Kahriger*, 345 U.S. 22 (1953), *overruled in part by* *Marchetti v. United States*, 390 U.S. 39 (1968).

164 *Id.* at 24 (citation omitted).

165 *Id.* at 23.

166 *Id.* at 27 (footnote omitted).

valid merely because it discourages or deters the activities taxed.”¹⁶⁷ Nor was the tax invalid “because the revenue obtained is negligible.”¹⁶⁸ It was true that the wagering tax, like other taxes that the Court had upheld, had a “regulatory effect.”¹⁶⁹ But it also produced annual revenue of over four million dollars, which was considerably more than the amounts produced by “both the narcotics and firearms taxes which we have found valid.”¹⁷⁰

Reed recognized that

[t]he difficulty of saying when the power to lay uniform taxes is curtailed, because its use brings a result beyond the direct legislative power of Congress, has given rise to diverse decisions. In that area of abstract ideas, a final definition of the line between state and federal power has baffled judges and legislators.¹⁷¹

As the *Child Labor Tax Case* and its progeny demonstrated, “[p]enalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid.”¹⁷² But “[u]nless there are provisions extraneous to any tax need,” courts were “without authority to limit the exercise of the taxing power.”¹⁷³ All of the provisions of the excise at issue were “adapted to the collection of a valid tax.”¹⁷⁴ The registration provisions made the tax “simpler to collect,” and were thus “directly and intimately related to the collection of the tax,” and “‘obviously supportable as in aid of a revenue purpose.’”¹⁷⁵

The *Sonzinsky* Court did not purport to overrule the *Child Labor Tax Case*; instead, Justice Stone’s opinion for the majority distinguished it. Neither did the *Sanchez* or *Kahriger* Courts suggest that the *Child Labor Tax Case* was not binding authority. Indeed, Justice Reed’s opinion in *Kahriger* treated both the *Child Labor Tax Case* and *Hill v. Wallace* as if they remained good law.¹⁷⁶ In his *Kahriger* dissent, Justice Frankfurter stood foursquare behind the *Child Labor Tax Case* decision. “[W]hen oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress,” Frankfurter insisted, “the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.”¹⁷⁷ For

167 *Id.* at 28.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* at 29.

172 *Id.* at 31.

173 *Id.*

174 *Id.*

175 *Id.* at 31–32 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

176 *Id.* at 28 n.5, 29 n.6, 31 n.10.

177 *Id.* at 38 (Frankfurter, J., dissenting).

to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could, as so significantly expounded in the *Child Labor Tax Case*, offer an easy way for the legislative imagination to control “any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with”¹⁷⁸

“I say ‘significantly,’” Frankfurter reminded his audience,

because Mr. Justice Holmes and two of the Justices who had joined his dissent in *Hammer v. Dagenhart*, McKenna and Brandeis, JJ., agreed with the opinion in the *Child Labor Tax Case*. Issues of such gravity affecting the balance of powers within our federal system are not susceptible of comprehensive statement by smooth formulas such as that a tax is nonetheless a tax although it discourages the activities taxed, or that a tax may be imposed although it may effect ulterior ends. No such phrase, however fine and well-worn, enables one to decide the concrete case.¹⁷⁹

Yet Frankfurter was not accusing the majority of overruling the *Child Labor Tax Case*. He was instead maintaining that the majority was declining to enforce a broader principle within which its holding was subsumed:

A nominal taxing measure must be found an inadmissible intrusion into a domain of legislation reserved for the States not merely when Congress requires that such a measure is to be enforced through a detailed scheme of administration beyond the obvious fiscal needs, as in the *Child Labor Tax Case*,

Frankfurter insisted.¹⁸⁰

That is one ground for holding that Congress was constitutionally disrespectful of what is reserved to the States. Another basis for deeming such a formal revenue measure inadmissible is presented by this case. In addition to the fact that Congress was concerned with activity beyond the authority of the Federal Government, the enforcing provision of this enactment is designed for the systematic confession of crimes with a view to prosecution for such crimes under State law.¹⁸¹

178 *Id.* (citation omitted) (quoting *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

179 *Id.* The Justice continued:

What is relevant to judgment here is that, even if the history of this legislation as it went through Congress did not give one the libretto to the song, the context of the circumstances which brought forth this enactment—sensationally exploited disclosures regarding gambling in big cities and small, the relation of this gambling to corrupt politics, the impatient public response to these disclosures, the feeling of ineptitude or paralysis on the part of local law-enforcing agencies—emphatically supports what was revealed on the floor of Congress, namely, that what was formally a means of raising revenue for the Federal Government was essentially an effort to check if not to stamp out professional gambling.

Id. at 38–39.

180 *Id.* at 39.

181 *Id.* Justice Douglas, “while not joining in the entire opinion” of Justice Frankfurter, “agree[d] with the views expressed herein that this tax is an attempt by the Congress to

That is, a nominal taxing measure was invalid whenever it was designed to infringe any of the affirmative limitations imposed by the first ten amendments to the Constitution.

That was precisely the case in the 1994 decision of *Department of Revenue of Montana v. Kurth Ranch*.¹⁸² There, members of the Kurth family were arrested and pled guilty to drug possession charges related to their cultivation and harvesting of marijuana plants.¹⁸³ The state of Montana thereafter sought to collect a state tax levied on the possession and storage of dangerous drugs.¹⁸⁴ The Supreme Court held that the tax, which averaged four times the market value of the confiscated drugs on which it was imposed, constituted a successive punishment for the same offense in violation of the Double Jeopardy Clause.¹⁸⁵ The Court recognized that *Sonzinsky* and *Sanchez* established that “neither a high rate of taxation nor an obvious deterrent purpose” automatically marked the tax as punitive.¹⁸⁶ But the *Child Labor Tax Case* had established that “‘there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.’”¹⁸⁷ After surveying the features of the tax, the Court found that, “[t]aken as a whole,” the Montana drug tax was “too far removed . . . from a standard tax assessment to escape characterization as a punishment.”¹⁸⁸

Thus, none of these later decisions overruled the *Child Labor Tax Case*, and the Court cited it as authoritative precedent as recently as 1994. As child labor historian Stephen Wood wrote in 1968, the *Child Labor Tax Case* “remains the authority, and forty years later is still the law of the land, conditioning congressional action and judicial decision-making. The judicial revolution that overtook the commerce power in the late thirties did not bring reversal.”¹⁸⁹

II. THE TAXING POWER ARGUMENT IN THE LOWER FEDERAL COURTS

All of the lower federal courts concluded that the minimum coverage provision was a regulatory penalty rather than a tax,¹⁹⁰ but they took differing views on the status of the *Child Labor Tax Case*. Three district courts

control conduct which the Constitution has left to the responsibility of the States.” *Id.* at 40.

182 511 U.S. 767 (1994).

183 *Id.* at 771–72.

184 *Id.* at 773.

185 *Id.* at 784.

186 *Id.* at 780.

187 *Id.* at 779 (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934)).

188 *Id.* at 783.

189 WOOD, *supra* note 101, at 284 (1968). Alexander Bickel similarly wrote in 1957 that “the *Child Labor Tax Case* retains influence.” BICKEL, *supra* note 24, at 19.

190 See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (“[U]ntil today, no federal court has accepted the implausible argument that § 5000A is an exercise of the tax power.”).

reached the conclusion that the shared responsibility payment was a regulatory penalty rather than a tax, but only for purposes of determining whether suits challenging the ACA were barred by the Anti-Injunction Act. These courts did not address the question of whether the shared responsibility payment was a tax for purposes of constitutional analysis.¹⁹¹ All of the lower courts that did address this issue, however, concluded that Congress intended the Act's shared responsibility payment to impose a regulatory penalty rather than a tax.

Several features of the Act's language and legislative history led the district and circuit courts to coalesce around this view. First, the statute expressly characterized the exaction as a "penalty" rather than as a "tax."¹⁹² This was especially significant in view of the fact that earlier versions of the bill had expressly imposed a "tax" on applicable individuals failing to acquire minimum coverage, which indicated that the ultimate choice of terminology was conscious and deliberate.¹⁹³ Second, several other sections of the Act expressly imposed taxes, demonstrating that Congress understood the difference between a tax and a penalty and knew how to impose a tax when it intended to do so.¹⁹⁴ Third, the Act did not purport on its face to be exercising the taxing power in imposing the shared responsibility payment for failure to acquire health insurance. Instead, the legislative findings made it clear that Congress had relied exclusively on the power conferred by the Commerce Clause.¹⁹⁵ The fact that the penalty was to be placed in the Internal Revenue Code under the heading "Miscellaneous Excise Taxes" was of no consequence, as the Code contains and the IRS enforces many penalties as well as taxes, and the Code itself¹⁹⁶ expressly provides that such a placement does not give rise to any inference or presumption that the exaction was

191 *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, 764 F. Supp. 2d 684, 694–97 (M.D. Pa. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 626–29 (W.D. Va. 2010); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 924 (N.D. Ohio 2010).

192 *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1314–15 (11th Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 551 (6th Cir. 2011) (Sutton, J., concurring in part); *Mead v. Holder*, 766 F. Supp. 2d 16, 40 (D.D.C. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 786 (E.D. Va. 2010); *Florida v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1134–35 (N.D. Fla. 2010).

193 *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d at 1317; *Mead*, 766 F. Supp. 2d at 41; *Cuccinelli*, 728 F. Supp. 2d at 786–87; *Florida v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp. 2d at 1134–36.

194 *Thomas More Law Ctr.*, 651 F.3d at 551 (Sutton, J., concurring in part); *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d at 1316–17; *Mead*, 766 F. Supp. 2d at 40; *Cuccinelli*, 728 F. Supp. 2d at 787; *Florida v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp. 2d at 1135–36.

195 *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d at 1316; *Thomas More Law Ctr.*, 651 F.3d at 551 (Sutton, J., concurring in part); *Mead*, 766 F. Supp. 2d at 41; *Cuccinelli*, 728 F. Supp. 2d at 786; *Florida v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp. 2d at 1135–36.

196 26 U.S.C. § 7806(b) (2006) ("No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title . . .").

intended to be a tax.¹⁹⁷ In addition, the Act did not make available to the IRS the usual tax collection enforcement mechanisms of liens, levies, and criminal proceedings.¹⁹⁸

Finally, the lower courts agreed that the exaction was not intended or designed to raise revenue. Judge Vinson of the District Court for the Northern District of Florida observed that the Act did not “mention any revenue-generating purpose that is to be served by the individual mandate penalty.”¹⁹⁹ Congress “failed to identify in the legislation any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified.”²⁰⁰ Judge Hudson of the District Court for the Eastern District of Virginia insisted that “the notion that the generation of revenue was a significant legislative objective is a transparent afterthought. The legislative purpose underlying this provision was purely regulation of what Congress misperceived to be economic activity.”²⁰¹ “No plausible argument” could be made that it had “‘the purpose of supporting the Government.’”²⁰² Judge Kessler of the District Court for the District of Columbia similarly maintained that “Congress did not intend the mandatory payment . . . to act as a revenue-raising tax, but rather as a punitive measure.”²⁰³ The Act’s legislative findings demonstrated that “the goal” of the minimum coverage provision was “not to raise revenue, but to achieve near-universal health care coverage by giving individuals the incentive to maintain their health insurance under threat of penalty.”²⁰⁴ The Eleventh Circuit concurred in this assessment,²⁰⁵ adding that the projection that the Act would generate some \$4 to 5 billion in annual revenue by the end of the decade did not make the exaction a tax rather than a penalty, because the Supreme Court had recognized in *Kurth Ranch* that “in our world of less than perfect compliance, penalties generate revenue just as surely as taxes.”²⁰⁶ Judge Sutton of the Sixth Circuit agreed that the “central function of the mandate was *not* to raise revenue” but instead “to change individual behavior

197 *Thomas More Law Ctr.*, 651 F.3d at 552 (Sutton, J., concurring in part); *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d at 1319–20; *Cuccinelli*, 728 F. Supp. 2d at 786; *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d at 1136–37.

198 *Thomas More Law Ctr.*, 651 F.3d at 552 (Sutton, J., concurring in part); *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d at 1320; *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d at 1139.

199 *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d at 1137.

200 *Id.* at 1139.

201 *Cuccinelli*, 728 F. Supp. 2d at 786.

202 *Id.* at 787 (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

203 *Mead v. Holder*, 766 F. Supp. 2d 16, 40 (D.D.C. 2011).

204 *Id.* at 41.

205 *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1317–18 (11th Cir. 2011).

206 *Id.* at 1318.

by requiring all qualified Americans to obtain medical insurance.”²⁰⁷ The legislative findings said nothing about raising revenue, and a good deal about bringing a large number of new consumers into the health insurance market. To the extent that the Act raised revenue, its proponents would regard it as unsuccessful.²⁰⁸ The fact that the minimum coverage provision was predicted to raise revenue of \$4 billion per year did not “convert the penalty into a tax,” for if the raising of revenue were sufficient to make an exaction a tax for constitutional purposes then “every monetary penalty, no matter how regulatory or punitive, would be a tax.”²⁰⁹ For these reasons, the exaction was not “a bona fide revenue raising measure enacted under the taxing power of Congress.”²¹⁰ Instead, “on its face,”²¹¹ it was “in form and substance,”²¹² “a civil regulatory penalty and not a tax.”²¹³

Lower court judges differed, however, on the status of the *Child Labor Tax Case*. Judge Wynn, in his concurring opinion in *Liberty University v. Geithner*, cited the decision as an example of “cases from the 1920s and 1930s suggest[ing] that taxes are either regulatory or revenue-raising and that the former are unconstitutional.”²¹⁴ But Judge Wynn maintained that more recent cases, such as *Sonzinsky*, *Sanchez*, and *Kahriger*, demonstrated “that the revenue-versus-regulatory distinction was short-lived and is now defunct.”²¹⁵ *Sonzinsky* taught us that “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any less a tax because it has a regulatory effect”²¹⁶ *Sanchez* taught us that “a tax—regardless of its label—‘does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.’”²¹⁷ And *Kahriger* taught that “‘a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed.’”²¹⁸ Earlier decisions such as *McCray* and *Doremus* taught similar lessons.²¹⁹ Judge Wynn remarked that in the 1974 case of *Bob*

207 *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 551 (6th Cir. 2011) (Sutton, J., concurring in part).

208 *Id.* at 551–52.

209 *Id.* at 552 (citing *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (“Criminal fines, civil penalties, civil forfeitures, and taxes all . . . generate government revenues, impose fiscal burdens on individuals, and deter certain behavior.”)).

210 *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 787 (E.D. Va. 2010).

211 *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1140 (N.D. Fla. 2010).

212 *Cuccinelli*, 728 F. Supp. 2d at 788.

213 *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1320 (11th Cir. 2011).

214 *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 417 (4th Cir. 2011) (Wynn, J., concurring), *vacated*, 133 S. Ct. 679 (2012).

215 *Id.*

216 *Id.* (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

217 *Id.* at 416 (quoting *United States v. Sanchez*, 340 U.S. 42, 44 (1950)).

218 *Id.* at 417 (quoting *United States v. Kahriger*, 345 U.S. 22, 28 (1953), *overruled in part* by *Marchetti v. United States*, 390 U.S. 39 (1968)).

219 *Id.*

Jones University v. Simon, “the Supreme Court recognized that, while in some early cases it ‘drew what it saw at the time as distinctions between regulatory and revenue-raising taxes,’ the Court ‘subsequently abandoned such distinctions.’”²²⁰ Judge Wynn drew from this history the conclusion that “neither an exaction’s label nor its regulatory intent or effect is germane to the constitutional inquiry.”²²¹ In modern taxing power cases, courts did not “look to labels, regulatory intent, or regulatory effect.”²²² The *Child Labor Tax Case* and its few progeny were nothing more than a brief, ill-advised detour from which the Court fortunately had backtracked.²²³

Judge Vinson also agreed that the Court had abandoned the distinction between revenue-raising and regulatory taxes. “It is true, as held in certain of the early tax cases . . . that the Supreme Court once drew distinctions between regulatory and revenue-raising taxes.”²²⁴ But *Sonzinsky*, *Sanchez*, and *Bob Jones* persuaded Judge Vinson that these distinctions “had a very short shelf-life.”²²⁵ Judge Vinson therefore assumed that “Congress could have used its broad taxing power to impose the exaction and that, if it had clearly (or even arguably) intended to do so, then the exaction would have been sustainable under its taxing authority.”²²⁶

The Eleventh Circuit did not directly address the status of the *Child Labor Tax Case*, but suggested that the question of the individual mandate’s constitutionality might have been different had the Act purported “on its face” to be an exercise of the taxing power—if Congress had “expressly and unmistakably indicated” that the provision was a tax.²²⁷ Under those circumstances, the court suggested, it would not matter that the tax was “‘burdensome or tends to restrict or suppress the thing taxed.’”²²⁸ In such a case courts would not inquire into “‘the hidden motives which may move Congress to exercise a power constitutionally conferred upon it.’”²²⁹ But here those principles were inapplicable, because the statute “on its face” imposed a penalty rather than a tax.²³⁰ It was “in every important respect” a “‘punishment for an unlawful act or omission,’ which defines the very ‘concept of penalty.’”²³¹

220 *Id.* (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974)).

221 *Id.* at 416.

222 *Id.* at 417.

223 *Id.* at 416–17.

224 *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1132 (N.D. Fla. 2010) (citations omitted).

225 *Id.*

226 *Id.* at 1133.

227 *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1319 (11th Cir. 2011).

228 *Id.* (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

229 *Id.* (quoting *Sonzinsky*, 300 U.S. at 513–14).

230 *Id.*

231 *Id.* (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

By contrast, Judge Hudson made clear his view that the *Child Labor Tax Case* and its progeny remained good law. “Notwithstanding criticism by the pen of some constitutional scholars,” he insisted,

[T]he constraining principles articulated in this line of cases, while perhaps dormant, remains [sic] viable and applicable to the immediate dispute. Although they have not been frequently employed in recent years, this absence appears to be more a product of the unprecedented nature of the legislation under review than an abandonment of established principles.²³²

In his concurring opinion in *Thomas More Law Center*, Judge Sutton likewise maintained that it was “premature . . . to abandon the distinction between taxes and penalties.”²³³ Judge Sutton rejected the Government’s contention that the Supreme Court in *Bob Jones* had “‘abandoned’” the “‘distinction[] between regulatory and revenue-raising taxes.’”²³⁴ This language from *Bob Jones* was “the purest of *dicta*, as the case involved the Anti-Injunction Act, not the taxing power, and was not even necessary to the statutory holding.”²³⁵ Judge Sutton conceded that many of the cases adhering to the tax/penalty distinction were “old,” but insisted that “cases of a certain age are just as likely to rest on venerable principles as stale ones, particularly when there is a good explanation for their vintage.”²³⁶ All of these decisions, Judge Sutton observed, “pre-date the Court’s expansion of the commerce power, which largely ‘rendered moot’ the need to worry about the tax/penalty distinction.”²³⁷ “Nonetheless,” Judge Sutton maintained, “the line between ‘revenue production and mere regulation,’ described by Chief Justice Taft in the *Child Labor Tax Case*, retains force today. Look no further than *Kurth Ranch*,” he advised his readers, “a 1994 decision that post-dated *Bob Jones* and that relied on the *Child Labor Tax Case* to hold that what Congress had labeled a tax amounted to an unconstitutional penalty under the Double Jeopardy Clause.”²³⁸

232 *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

233 *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 553 (6th Cir. 2011) (Sutton, J., concurring in part).

234 *Id.* (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974)).

235 *Id.*; *see also Bob Jones Univ.*, 416 U.S. at 741 n.12 (“Even if such distinctions have merit, it would not assist petitioner, since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which clearly are intended to raise revenue.”); *Cuccinelli*, 728 F. Supp. 2d at 784–85 (noting that the *Bob Jones University* footnote is *dicta*).

236 *Thomas More Law Ctr.*, 651 F.3d at 553 (Sutton, J., concurring in part).

237 *Id.* (quoting LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 846 (3d ed. 2000)).

238 *Id.* (citation omitted); *see also Cuccinelli*, 728 F. Supp. 2d at 785 (noting that *Kurth Ranch* “restated with approval” the proposition in the *Child Labor Tax Case*).

III. TAXING POWER ARGUMENTS BEFORE THE SUPREME COURT

The briefs for the parties submitted to the Supreme Court scarcely touched on the taxing power precedents.²³⁹ The Government's brief devoted little more than a page to their discussion, and did not even mention the *Child Labor Tax Case*.²⁴⁰ The Solicitor General pointed out that the minimum coverage provision would "plainly be 'productive of some revenue,' and thus satisfies a key attribute of taxation."²⁴¹ The Eleventh Circuit's perception that the goal of the minimum coverage provision was to reduce the number of uninsured people rather than to raise revenue was inapt, for *Sanchez* taught that a tax "'does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.'"²⁴² *Sonzinsky* and *Kahriger* reminded us that "'[e]very tax is in some measure regulatory,' in that 'it interposes an economic impediment to the activity taxed as compared with others not taxed.'"²⁴³ As long as the statute was "'productive of some revenue,'" Congress could "exercise its taxing powers irrespective of any 'collateral inquiry as to the measure of the regulatory effect of a tax.'"²⁴⁴ Thus, as the *Sanchez* Court had observed, "'[f]rom the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.'"²⁴⁵ *Bob Jones* had announced that the

239 The oral arguments likewise devoted scant attention to the taxing power issue. Solicitor General Verrilli's colloquy on the subject comprised only eight pages of the transcript and only fleetingly considered the precedents. Transcript of Oral Argument at 44–52, *Dep't of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398). Counsel for the Respondents Paul Clement's discussion of the issue consumed less than a page. *Id.* at 78–79.

240 See Brief for Petitioners (Minimum Coverage Provision) at 54–55, *Dep't of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398). The precedents were discussed more extensively in Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners (Minimum Coverage Provision) at 7–15, *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398); *id.* at 10, 13 (arguing that the Court had "discredited" its "*Lochner*-era decisions" on the scope of the taxing power); Brief of Service Employees International Union and Change to Win as *Amici Curiae* Addressing the Minimum Coverage Provision Issue and Supporting Petitioners and Reversal at 20–28, *Dep't of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398); *id.* at 22, 26–27 (dismissing the *Child Labor Tax Case* and its progeny as "discredited *Lochner*-era cases"). Notably, none of the amici opposing the ACA produced analyses of the taxing power issue challenging these contentions.

241 Brief for Petitioners (Minimum Coverage Provision), *supra* note 240, at 54 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937)).

242 *Id.* at 55 (quoting *United States v. Sanchez*, 340 U.S. 42, 44 (1950)).

243 *Id.* (quoting *Sonzinsky*, 300 U.S. at 513) (citing *United States v. Kahriger*, 345 U.S. 22, 24 (1953), *overruled in part by* *Marchetti v. United States*, 390 U.S. 39 (1968)).

244 *Id.* at 55 (quoting *Sonzinsky*, 300 U.S. at 514).

245 *Id.* (quoting *Sanchez*, 340 U.S. at 45).

Court had “long ‘abandoned the view that bright-line distinctions exist between regulatory and revenue-raising taxes.’”²⁴⁶

The respondents argued that Congress had called the exaction a penalty “because it is, in fact, a penalty.”²⁴⁷ It did not matter that the exaction would be housed in the Internal Revenue Code and would be productive of some revenue. The Code contained a number of civil penalties, and such penalties did generate some revenue, but that did not make them taxes.²⁴⁸ The respondents insisted that the shared responsibility payment should be considered a penalty even had it been labeled a tax, because it was “a monetary exaction . . . imposed as a consequence for failure to abide by a separate legal command,” namely, the command to acquire and maintain minimum essential coverage.²⁴⁹ The *Child Labor Tax Case* established that “Congress may not use its tax power to circumvent the Constitution’s enumeration of limited *regulatory* powers by ‘enact[ing] a detailed measure of complete regulation of [a] subject and enforc[ing] it by a so-called tax upon departures from it.’”²⁵⁰ That precedent continued to stand for the proposition that “Congress may not ‘break down all constitutional limitation [on its] powers . . . and completely wipe out the sovereignty of the states’ by invoking its tax power to enforce commands that it lacks the authority to impose.”²⁵¹ Because the ACA “imposes a command that is unprecedented and invokes a power that is both unbounded and not included among the limited and enumerated powers granted to Congress,” the respondents concluded, it was “therefore unconstitutional.”²⁵²

Perhaps in light of the respondents’ reliance on the *Child Labor Tax Case*, the Government did feel the necessity to engage the precedent in its reply brief. The Solicitor General did so by denying that the shared responsibility payment constituted “punishment for an unlawful act,”²⁵³ and by identifying three features of the exaction that distinguished it from the Child Labor Tax. First, it was “tied to income” and “due only for months in which coverage is not maintained,” unlike the Child Labor Tax, which was not “‘proportioned in any degree to the extent or frequency of the departures.’”²⁵⁴ Second, the shared responsibility payment contained no scienter requirement.²⁵⁵ And

246 *Id.* (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 743 n.17 (1974)).

247 Brief for State Respondents on the Minimum Coverage Provision at 61, *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398); *see also id.* at 58–60.

248 *Id.* at 60–61.

249 *Id.* at 57–59.

250 *Id.* at 58 (quoting *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

251 *Id.* at 63 (quoting *Child Labor Tax Case*, 259 U.S. at 38).

252 *Id.* at 64.

253 Reply Brief for Petitioners (Minimum Coverage Provision), *supra* note 240, at 22.

254 *Id.* at 23 (quoting *Child Labor Tax Case*, 259 U.S. at 36); *see also* Transcript of Oral Argument at 50–51, *Dep’t of Health and Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398).

255 Reply Brief for Petitioners (Minimum Coverage Provision), *supra* note 240, at 22; *see also* Transcript of Oral Argument, *supra* note 254, at 50–51.

third, enforcement was to be handled solely by the IRS, rather than in part by the Department of Labor or some other government agency unconnected to the collection of revenue.²⁵⁶ Those distinctions would prove critical to the Supreme Court's resolution of the taxing power issue.

IV. CHIEF JUSTICE ROBERTS AND THE TAXING POWER

Chief Justice Roberts was prepared to overlook the drafting features of the statute that had persuaded the lower courts that the shared responsibility payment could not be treated as a tax. It was “well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”²⁵⁷ Thus, “‘every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.’”²⁵⁸ The Chief Justice concluded that “[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance.”²⁵⁹ Nevertheless, it was “necessary to ask whether the Government’s alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.”²⁶⁰ The question was not whether the Government’s reading was “the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.”²⁶¹ “Granting the Act the full measure of deference owed to federal statutes,” Chief Justice Roberts concluded, the mandate could be interpreted as imposing a tax.²⁶²

This resolution of the statutory construction issue accordingly led the Chief Justice to the question of whether the individual mandate presented a constitutional exercise of Congress’s taxing power. Unlike some of the lower courts, both Chief Justice Roberts and the dissenting Justices treated the *Child Labor Tax Case* as a precedent with continuing authority. Rather than overruling the *Child Labor Tax Case*, Chief Justice Roberts sought in several respects to distinguish the Child Labor Tax from the shared responsibility payment imposed by the ACA. This section examines each of those distinctions.

A. *The Burden of the Exaction*

First, Chief Justice Roberts argued that the Child Labor Tax “imposed an exceedingly heavy burden—10 percent of a company’s net income—on

256 Reply Brief for Petitioners (Minimum Coverage Provision), *supra* note 240, at 22; *see also* Transcript of Oral Argument, *supra* note 254, at 50–51. These features were similarly emphasized in Brief of Service Employees International Union and Change to Win as *Amici Curiae* Addressing the Minimum Coverage Provision Issue and Supporting Petitioners and Reversal, *supra* note 240, at 24–26.

257 Nat’l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012).

258 *Id.* at 2594 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

259 *Id.* at 2593.

260 *Id.*

261 *Id.* at 2594 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

262 *Id.*

those who employed children, no matter how small their infraction.”²⁶³ By contrast, under the ACA, “for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the ‘prohibitory’ financial punishment” imposed by the Child Labor Tax.²⁶⁴ Chief Justice Roberts recognized that the “shared responsibility payment,” like the Child Labor Tax, was “plainly designed” to affect behavior.²⁶⁵ “But taxes that seek to influence conduct are nothing new,” he observed, and as *Sonzinsky* pointed out, “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.”²⁶⁶ The fact that the ACA “seeks to shape decisions about whether to buy health insurance [therefore did] not mean that it [could not] be a valid exercise of the taxing power.”²⁶⁷ Thus, Chief Justice Roberts seemed to suggest, the fact that the Child Labor Tax sought to influence conduct was not its fatal flaw. Instead, its problem was that the levy it imposed in order to do so was “prohibitory.”

Chief Justice Taft did describe the Child Labor Tax as “prohibitory,” but that seems to have been putting it too strongly.²⁶⁸ There can be little doubt that the tax reduced the employment of child labor,²⁶⁹ but it clearly did not prevent such labor. Recall that the Child Labor Tax imposed the excise on firms employing children under the age of sixteen in mines and quarries, and on firms employing children under eighteen in manufacturing enterprises.²⁷⁰ The 1920 Census, taken the year after the tax went into effect, showed 7,191 children under the age of sixteen employed in the “Extraction of minerals” and 9,473 children under fourteen employed in “Manufacturing and mechanical industries.”²⁷¹ The 1910 Census had shown 18,090 children under sixteen employed in the “Extraction of minerals,” meaning that there were 10,899 fewer children so employed in 1920.²⁷² The 1910 Census data on children employed in “Manufacturing and mechanical industries” is less

263 *Id.* at 2595.

264 *Id.* at 2595–96 (footnote omitted).

265 *Id.* at 2596.

266 *Id.*

267 *Id.*

268 *Child Labor Tax Case*, 259, U.S. 20, 37 (1922).

269 See Thomas Reed Powell, *Child Labor, Congress, and the Constitution*, 1 N.C. L. REV. 61, 69 (1922) (“No one can doubt that such a law would have a depressing effect on child labor. Miners and manufacturers would naturally prefer to enjoy this ten per cent of their net income in pursuits of their own rather than to devote it to the more or less laudable enterprises of the national government. Thus children would be likely to find the factory doors barred against them except when operators would figure that they might be hired at sufficiently low wages to make a saving in labor cost greater than ten per cent of anticipated net income.”).

270 Pub. L. No. 65-254, 40 Stat. 1057, 1138 (1919).

271 U.S. BUREAU OF THE CENSUS, *FOURTEENTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1920*, at 477.

272 *Id.*

granular, reporting only that there were 260,932 children under the age of sixteen so employed.²⁷³ The 1920 Census reflects such employment of 185,337 children, indicating a reduction in this larger category of 75,595.²⁷⁴ The data do not reveal how much of this reduction in manufacturing employment should be allocated to children under fourteen. Nor is it clear to what extent these reductions in the employment of children should be attributed to the effect of the tax, and how much to other factors, such as significant improvements between 1910 and 1920 in the standards imposed by state child labor laws and state school attendance laws; advances in mechanization requiring the operation of skilled older workers; the “growth of organized labor,” which opposed competition from cheap child labor; and changes in parental attitudes toward child labor.²⁷⁵ What is clear, however, is that the Child Labor Tax did not eliminate the forms of labor that triggered its application. As the 1922 Report of the Chief of the Children’s Bureau put it,

The returns from the 1920 census, taken at the beginning of a period of industrial depression and with the Federal child labor tax law discouraging their employment, show fewer children under 14 and under 16 gainfully employed than did the census of 1910; but the decline is much less than it should be²⁷⁶

As the *New York World* editorialized when the tax was being considered by Congress:

[W]e can see no objection except that the proposed Federal tax is too small. Ten per cent, on the value of the products of enslaved childhood is not

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN* 159 (1970); WOOD, *supra* note 101, at 251–52. Professor Trattner observes that “[b]y the end of 1909 only four Southern states (and the District of Columbia) had a minimum working age of fourteen for factories. All the others, including the Carolinas—the two leading cotton textile-producing states in the region—retained only a twelve-year age limit.” TRATTNER, *supra*, at 99. As of 1912, twenty-two states “still permitted children under fourteen to work in factories,” and “thirty states still allowed boys under sixteen to work in mines.” *Id.* at 115. But by 1914, Professor Wood reports, thirty-six states “had a minimum-age requirement of fourteen years for industrial employment.” WOOD, *supra* note 101, at 24 n.8. On that front, “success had in large measure been attained. . . . Except for conspicuously backward areas, the worst horrors were almost gone.” *Id.* at 23. And as Clarke Chambers notes, “[e]ven in the South . . . amendments to state laws had been secured after 1916 which brought it closer in line with the rest of the nation.” CLARKE A. CHAMBERS, *SEEDTIME OF REFORM* 32 (1963). As Professor Wood reports, in February of 1919 the North Carolina legislature enacted a fourteen-year minimum-age standard for industrial employment. “The last of the southern textile states to hold out against national standards of regulation with respect to excluding grade-school-age children from industrial employment had now come into line.” WOOD, *supra* note 101, at 223–24. For a detailed summary of the status of state child labor laws in 1919, see JULIA C. LATHROP, *CHILDREN’S BUREAU, U.S. DEP’T OF LABOR, CHILDREN’S YEAR LEAFLET NO. 13, BUREAU PUB. NO. 58, THE STATES AND CHILD LABOR* (1919).

²⁷⁶ JAMES J. DAVIS, *CHILDREN’S BUREAU, U.S. DEP’T OF LABOR, TENTH ANNUAL REPORT OF THE CHIEF TO THE SEC’Y OF LABOR* 12 (1922).

enough to emancipate the youth of the South or to curb the greed of its employers or to correct the depraved public sentiment against which the levy is aimed.²⁷⁷

The fact that the tax was not in a strong sense "prohibitory" is reflected in the fact that it actually generated revenue. For the fiscal year ending June 30, 1920, the Annual Report of the Commissioner of Internal Revenue indicated \$2,380.20 in revenue from the tax, derived from assessments in Delaware, Maryland, and South Carolina.²⁷⁸ As the Commissioner explained, "[l]ittle tax could be collected during 1920, as the law provides that the taxpayer shall be given two months after the completion of his business year in which to make a return of the amount of tax due. Furthermore, an audit of the return is necessary in every instance."²⁷⁹ Accordingly, some of the taxes owed due to employment of children during the fiscal year ending June 30, 1920, were in fact collected during the following fiscal year. This was reflected in the Commissioner's report for the fiscal year ending June 30, 1921, which reported revenue from the tax totaling \$24,223.67, derived from assessments in Georgia, Mississippi, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and Virginia.²⁸⁰ And for the fiscal year ending June 30, 1922, the Commissioner reported revenue of \$15,224.99, derived from assessments in Delaware, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Wyoming.²⁸¹ The tax

277 Quoted in *A New Weapon Against Child Labor*, LITERARY DIG., Jan. 4, 1919, at 14.

278 U.S. INTERNAL REVENUE SERV., ANNUAL REPORT OF THE COMM'R OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30 1920, NO. 2875, at 16, 70-71 (1920) [hereinafter 1920 ANNUAL REPORT].

279 *Id.* at 20.

280 U.S. INTERNAL REVENUE SERV., ANNUAL REPORT OF THE COMM'R OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30 1921, NO. 2896, at 16, 64-65 (1921) [hereinafter 1921 ANNUAL REPORT]. These figures, denominated "Receipts," presumably do not include any amounts that may have been assessed but the collection of which may have been enjoined, as was the case in *Bailey v. George*, 259 U.S. 16 (1922), where the lower court in 1921 enjoined collection of \$2,098 against the Vivian Cotton Mills in November of 1920. *Id.* at 19; WOOD, *supra* note 101, at 265.

281 U.S. INTERNAL REVENUE SERV., ANNUAL REPORT OF THE COMM'R OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30 1922, NO. 2911, at 70-71 (1922) [hereinafter 1922 ANNUAL REPORT]. It seems unlikely that all of these taxes were paid under protest with the taxpayers anticipating that the Court would invalidate the law and award them a refund. Commentators generally anticipated that the law would be upheld on the basis of existing precedents and expressed surprise when it was not. See *A New Campaign Against Child Labor*, 120 THE OUTLOOK, 514, 518 (1918) (expressing optimism that the Court would uphold the law); David Brady, *A Forecast of the Supreme Court Decision on the Child Labor Tax Law*, THE AM. CHILD 115, 115-17 (1919) ("[I]f the decision in the Doremus case is followed, when the Child Labor Tax Law is presented for the consideration of the Supreme Court—probably next October—that Court will certainly hold that Congress can do under its taxing power what that same Court about a year ago held that Congress could not do under its power to regulate interstate commerce."); *Child Labor and the Constitution*, 114 THE NATION 638, 639 (1922) (finding the Child Labor Tax decision "surprising" in view of the precedents); *Current Decisions, Constitutional Law—Federal Taxing Power—Regulation of Child Labor by Taxation*, 31 YALE L.J. 894, 894 (1922) (stating that "[t]he oleomarga-

thus raised more annual revenue than did the provision of the National Firearms Tax unanimously upheld in *Sonzinsky*,²⁸² which in 1934 was paid by twenty-seven dealers resulting in revenue of \$5,400, and in 1935 was paid by twenty-two dealers resulting in revenue of \$4,400.²⁸³ Receipts under the Child Labor Tax also exceeded collections under the Marihuana Tax of

rine case and similar authorities . . . were supposed to forecast the opposite conclusion" in the *Child Labor Tax Case*); W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 151 (1919) ("[T]he result sought in vain under the commerce power . . . is likely to be accomplished under a broadly construed taxing power."); *Federal Regulation of Child Labor*, 22 L. NOTES 205, 205 (1919) ("It is difficult to see on what ground the validity of the law can be attacked. . . . That the ultimate effect of the enactment is to prohibit, rather than to raise revenue, is no objection to its validity . . ."); Raymond G. Fuller, *A Quest of Constitutionality*, 7 THE CHILD LAB. BULL. 207, 213 (1918) (assuring readers that there were "many reasons for believing that such a [tax] bill, if passed by Congress, will meet the test of constitutionality in the courts"); Raymond G. Fuller, *Child Labor and the War*, 58 THE AM. REV. OF REVS 500, 501 (1918) (stating that "Congress probably can prohibit child labor by taxing its products"); Nat'l Child Labor Comm., *Editorial and News Notes*, 7 THE CHILD LAB. BULL. 150, 151 (1918) ("[A] federal child-labor measure, based on the taxing power of Congress, offers a constitutional means of doing to child labor products (so far as mines, quarries, canneries and factories are concerned) exactly what was done to state bank notes, artificially colored oleomargarine and poisonous phosphorus matches—viz., tax them out of existence."); *Planning a New Child Labor Law*, 40 THE SURVEY 323, 323–24 (1918) (suggesting imposition of an excise tax on child-made goods, relying on the precedents of such regulatory taxes imposed on colored oleomargarine and white phosphorus matches); Thomas Reed Powell, *The Child-Labor Decision*, 106 THE NATION 730, 731 (1918) ("If Congress . . . should impose a special excise on making goods with the labor of children, the Supreme Court could not defeat its purpose without directly abandoning the case which sustained the excise on oleomargarine."); *Recent Decisions, Constitutional Law: Child Labor Law*, 10 CAL. L. REV. 95, 95–96 (1921) ("The state bank-tax case and the oleomargarine tax case throw grave doubt upon the correctness of the decision [of the district court invalidating the Child Labor Tax]."); *Recent Decisions, Constitutional Law—Taxation—Products of Child Labor*, 22 COLUM. L. REV. 370, 370 (1922) ("It may be that the Supreme Court, in order to protect state rights, will . . . overrule *McCray v. United States* . . . and the other taxation cases, and hold the statute under consideration unconstitutional because its primary purpose is to control manufacturing conditions. But those cases are still law and the district court [that invalidated the law] should have followed them."); Henry M. Bates, Comment, *Child Labor Law Case—Commerce Power of Congress and Reserved Powers of the States*, 17 MICH. L. REV. 83, 87 (1918) ("The scientific and popular opinion is so strong for the prohibition of child labor in this country that it is certain to be obtained sooner or later. It would seem clear that this object may be obtained by an exercise of the taxing power of Congress under the doctrine laid down in *McCray v. U. S.* . . ."); T.W.S., Comment, *Regulating Child Labor by Federal Taxation*, 31 YALE L.J. 310, 314 (1922) ("Conceivably the Supreme Court may decide that Congress has gone too far in the Child Labor Tax Law because the indirect result is to regulate a local matter. But to reach this decision they must overrule the *McCray* case It does not seem likely that they will do so.").

282 *Sonzinsky v. United States*, 300 U.S. 506, 511, 514 (1937).

283 *Id.* at 514 n.1 (citing U.S. INTERNAL REVENUE SERV., ANNUAL REPORT OF THE COMM'R OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30 1935, NO. 3075, at 129–131 (1935) [hereinafter 1935 ANNUAL REPORT]; U.S. INTERNAL REVENUE SERV., ANNUAL REPORT OF THE COMM'R OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30 1936, NO. 3082, at 139–41 (1936) [hereinafter 1936 ANNUAL REPORT]).

1937—unanimously upheld in *Sanchez*²⁸⁴—which, for example, produced revenue of \$4,538 in 1939 and \$4,703 in 1940.²⁸⁵

Thus, the taxes that the Court has upheld cannot be distinguished from the Child Labor Tax on the ground that the former have produced “some revenue”²⁸⁶ while the latter did not. The Child Labor Tax did produce “some revenue,” indeed more than was produced by some of the taxes that have been upheld. Contrary to the view sometimes expressed, therefore, it is plain that the supposed distinction between constitutional revenue-raising and unconstitutional regulatory taxes²⁸⁷ was *never* an organizing feature of the Court’s taxing power jurisprudence—for the paradigmatic unconstitutional regulatory tax—the Child Labor Tax—was itself a revenue-raiser. If the *Child Labor Tax Case* is still good law, therefore, it must be true that the production of “some revenue” is at best a necessary condition, and not a sufficient condition, for a tax to be constitutional.²⁸⁸ Indeed, Chief Justice Roberts’s own formulation indicates that this is his understanding—he

284 *United States v. Sanchez*, 340 U.S. 42, 46 (1950).

285 U.S. INTERNAL REVENUE SERV., ANNUAL REPORT OF THE COMM’R OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30 1940, No. 3110, at 26 (1940) [hereinafter 1940 ANNUAL REPORT].

286 *Sonzinsky*, 300 U.S. at 514.

287 See *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 417 (4th Cir. 2011) (Wynn, J., concurring), *vacated*, 133 S. Ct. 679 (discussing Supreme Court tax cases from the 1920s and 1930s); *Florida v. U.S. Dep’t of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1131–32 (N.D. Fla. 2010) (rejecting the “revenue-raising” versus “regulatory” test for taxes); Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners (Minimum Coverage Provision), *supra* note 240, at 10 (“The Court has . . . ‘abandoned’ its earlier ‘distinctions between regulatory and revenue-raising taxes’” (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974))); Brief of Service Employees International Union and Change to Win as *Amici Curiae* Addressing the Minimum Coverage Provision Issue and Supporting Petitioners and Reversal, *supra* note 240, at 27 (“[T]his Court has ‘abandoned’ the *Lochner*-era ‘distinction[] between regulatory and revenue-raising taxes.’” (alteration in original) (quoting *Bob Jones Univ.*, 416 U.S. at 741 n.12)); Cooter & Siegel, *supra* note 25, at 1213 (explaining that decisions from the 1920s and 1930s “distinguished regulatory exactions, which the Court deemed to be penalties, from revenue-raising exactions, which the Court regarded as taxes”); *id.* at 1218 (referring to “the pre-1937 Court’s distinction between regulatory and revenue-raising taxes”); see also *Bob Jones Univ.*, 416 U.S. at 741 n.12 (noting a former distinction between regulatory and revenue-raising taxes).

288 Cf. *Liberty Univ.*, 671 F.3d at 416 (Wynn, J., concurring) (“As long as a statute is ‘productive of some revenue,’ Congress may exercise its taxing power without ‘collateral inquiry as to the measure of the regulatory effect [of the statute in question].’” (alteration in original) (quoting *Sonzinsky*, 300 U.S. at 514)); *id.* at 418 (“The amount of revenue raised is irrelevant: A tax does not cease to be one ‘even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary.’ Instead, the measure must simply be ‘productive of some revenue.’” (quoting *Sanchez*, 340 U.S. at 44; *Sonzinsky*, 300 U.S. at 514)); *Seven-Sky v. Holder*, 661 F.3d 1, 48 n.37 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits) (“[T]he Taxing Clause authorizes regulatory taxes, at least so long as the tax raises some revenue, as it does here.” (citing *Sanchez*, 340 U.S. at 44–45; *Sonzinsky*, 300 U.S. at 513–14)), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

observes that the “[s]hared responsibility payment”²⁸⁹ bears “the essential feature of any tax: it produces at least some revenue for the Government.”²⁹⁰ The Child Labor Tax also exhibited this “essential feature.”

Indeed, there is a feature of the Child Labor Tax that may in some instances have made it even less coercive of behavior than were some of the taxes that the Court has upheld—for under the Child Labor Tax, it was possible to engage in the activity that was subject to taxation and nevertheless escape payment of the tax. This is because the Child Labor Tax imposed an excise of ten percent on the “net profits” of the firm employing child labor.²⁹¹ In computing the net profits of the business, the statute allowed deductions for a variety of expenses, including the “cost of raw materials;” interest paid on loans; taxes; uncompensated casualty losses; depreciation; and “[r]unning expenses, including rentals, cost of repairs, and maintenance, heat, power, insurance, management, and a reasonable allowance for salaries or other compensations for personal services actually rendered.”²⁹² The availability of these deductions, which reduced net profits, provided opportunities for strategic tax avoidance. An entity could elect to incur or to pay deductible costs—such as acquisition of raw materials, the making of repairs, the purchase of equipment, the expansion of plant capacity, the payment of bills and taxes, and the like—into years in which child labor was employed and in which significant profits were made or anticipated. In addition, and most importantly, the deductibility of reasonable payments of salary made it possible for closely-held businesses to compensate owners and family members by placing them on the payroll and thereby reducing the firm’s exposure to the Child Labor Tax. Just as closely-held corporations routinely have compensated their shareholders through deductible salary rather than taxable dividends in order to avoid two levels of taxation on the company’s income,²⁹³ so the Child Labor Tax permitted a company employing child labor to reduce or eliminate its taxable “net profits” by paying out “reasonable” compensation to employee-owners and family members.

An examination of the Annual Reports of the Commissioner for Internal Revenue suggests that at least some companies employing child labor engaged in such strategic tax avoidance. For the fiscal year ending June 30, 1920, the Commissioner reported that “[d]uring the year liability to tax has been established in the following States: Arizona, California, Delaware, Georgia, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina,

289 *Sebelius*, 132 S. Ct. at 2594 (alteration in original) (quoting 26 U.S.C. § 5000A(b) (2006 & Supp. IV 2010)).

290 *Id.* (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953), *overruled in part by* *Marchetti v. United States*, 390 U.S. 39 (1968)).

291 Revenue Act of 1918, Pub. L. No. 65-254, § 1200, 40 Stat. 1057, 1138 (1919).

292 *Id.* § 1201.

293 MARVIN A. CHIRELSTEIN & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION* 158–59 (12th ed. 2012).

Tennessee, Texas, Virginia, and Washington.”²⁹⁴ Yet neither the 1920 nor the 1921 report reflects any tax actually collected from Arizona, California, Illinois, Indiana, Louisiana, Michigan, New Jersey, New York,, Oklahoma,, or Washington;²⁹⁵ and of these states, only entities in New Jersey and Oklahoma paid any such taxes for the fiscal year ending June 30, 1922.²⁹⁶ This means that, for the fiscal year ending June 30, 1920, there were at least eight and probably as many as ten states in which the Commissioner “established” “liability to tax,” and yet from which no taxes were in fact paid. Assuming that “liability to tax” implies that all of the prerequisites to taxation under the law had been established, this suggests that it turned out that for the years in question there was no “net income” on which to impose the excise.

The possibility that firms employing child labor engaged in such strategic tax avoidance is also suggested by the size of some of the collections reflected in the Commissioner for Internal Revenues Annual Reports. The Drexel Furniture Company’s payment in 1922 of \$6,312.79²⁹⁷ was on the high side, and thus one can understand why Chief Justice Taft and his colleagues may have regarded it as a “heavy exaction.”²⁹⁸ But had the Justices been aware of the size of collections in other districts, they might not have believed that the tax was invariably so burdensome. For example, the 1920 Annual Report reflects a collection from Delaware of \$59.64,²⁹⁹ while the 1922 Annual Report reflects collections from Maryland of \$99.20, from Wyoming of \$79.69, from Mississippi of \$50.24, from Delaware of \$10.44, and from Tennessee of \$9.43.³⁰⁰ Many of the other collections reported were under \$1,000.³⁰¹ Either through lack of financial success or as a result of attentive planning, a number of firms employing child labor appear to have reduced their tax liability to modest or nominal sums, or to have eliminated such liability altogether. For a number of firms employing child labor, then, the Child Labor Tax may have been—as Professor George Cooper once famously said of the estate tax—a “voluntary tax.”³⁰² For these firms, it may

294 1920 ANNUAL REPORT, *supra* note 278, at 20.

295 See *id.* at 70–71; 1921 ANNUAL REPORT, *supra* note 280, at 64–65.

296 1922 ANNUAL REPORT, *supra* note 281, at 70–71.

297 Child Labor Tax Case, 259 U.S. 20, 34 (1922).

298 *Id.* at 36.

299 1920 ANNUAL REPORT, *supra* note 278, at 70.

300 1922 ANNUAL REPORT, *supra* note 281, at 70–71.

301 See 1920 ANNUAL REPORT, *supra* note 278, at 70–71 (Maryland, \$341.42); 1921 ANNUAL REPORT, *supra* note 280, at 64–65 (Ohio, \$298.02; Pennsylvania, \$939.06; Tennessee, \$960.36; Texas, \$325.16; Vermont, \$151.31); 1922 ANNUAL REPORT, *supra* note 281, at 70–71 (Missouri, \$412.82; Oklahoma, \$562.08). The largest collections reported, in addition to the tax paid by the Drexel Furniture Company in 1922, were \$1,979.14 in South Carolina in 1920, 1920 ANNUAL REPORT, *supra* note 278, at 70–71; \$1,271.09 in Georgia, \$2,229.80 in Mississippi, \$16,372.87 in North Carolina, and \$1,676.00 in Virginia in 1921, 1921 ANNUAL REPORT, *supra* note 280, at 64–65; and \$6,463.18 in New Jersey, \$6,312.79 in North Carolina, and \$1,225.13 in Pennsylvania in 1922, 1922 ANNUAL REPORT, *supra* note 281, at 70–71.

302 George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 221 (1977).

have been, as Chief Justice Roberts puts it, “a reasonable financial decision”³⁰³ to employ child labor and to pay whatever tax, if any, might result.

Moreover, child labor reformers apparently did not believe that the tax could be salvaged by lowering the rate to make it less “prohibitory” or by tailoring it to be more proportional to the extent of the offense. Chief Justice Taft had observed that

[i]f an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day.”³⁰⁴

Chief Justice Roberts similarly noted that the full ten percent levy was imposed on employers “no matter how small their infraction.”³⁰⁵ A reduced or more proportioned rate presumably would have had less of a deterrent effect on some potential employers of child labor than would a ten percent excise on annual net profits. But in the immediate wake of the Court’s decision invalidating the Keating-Owen Child Labor Act in *Hammer v. Dagenhart*,³⁰⁶ at least two members of the national legislature proposed that Congress adopt such legislation. On June 11, 1918, Republican Representative William E. Mason of Illinois suggested that were Congress “to tax all people who employ children under 16 in the mines or under 14 in the factories \$2 per day for each day for each child so employed, it may have a healthy effect in bringing about this much-hoped-for reform.”³⁰⁷ Mason reported that he had proposed such an amendment to the revenue bill to the Committee on Ways and Means, and “hope[d] for its favorable consideration.”³⁰⁸ This suggestion was not revived in the wake of the Child Labor Tax decision. Nor did Congress resuscitate the bill introduced on July 11, 1918, by Senator Irvine L. Lenroot, Republican of Wisconsin. Lenroot’s proposal— “[a] bill . . . to provide increased revenue”—would have imposed on enterprises employing children in violation of the Keating-Owen standards “an excise tax of five per centum upon the entire net profits received . . . from the sale or disposition of the product.”³⁰⁹ The idea of lower or more closely tailored rates had occurred to reformers even before the Child Labor Tax had been

303 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012).

304 Child Labor Tax Case, 259 U.S. 20, 36 (1922).

305 *Sebelius*, 132 S. Ct. at 2595.

306 247 U.S. 251, 277 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

307 56 CONG. REC. 461 (1918).

308 *Id.* Mason would offer such an amendment on the floor on April 11, 1921, with H.R. 110, “A bill to amend the revenue laws of the United States,” would have imposed a tax of two dollars per day on enterprises employing persons under the age of sixteen in any mine or quarry in the United States, or employing persons under the age of fourteen in any mill, cannery, workshop, factory, or manufacturing establishment in the United States. The bill was referred to the Committee on Ways and Means. H.R. 110, 67th Cong. (1921); 61 CONG. REC. 89 (1921).

309 56 CONG. REC. 8964 (1918).

enacted; but in the wake of the Court's decision, they no longer regarded such measures as viable options.

B. *Scienter and Enforcement*

Chief Justice Roberts also offered two other distinctions between the ACA and the Child Labor Tax. First, he observed that the Child Labor Tax contained a scienter requirement, imposing the exaction "only on those who knowingly employed underage laborers."³¹⁰ "Such scienter requirements," he explained, "are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law."³¹¹ By contrast, the Chief Justice noted, "the individual mandate contains no scienter requirement."³¹² Second, the Chief Justice observed that the Child Labor "tax" was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue."³¹³ The ACA's "shared responsibility payment,"³¹⁴ however, "is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution."³¹⁵

It is true that these features distinguish the shared responsibility payment from the excise imposed by the Child Labor Tax. But child labor reformers in the 1920s do not appear to have regarded these distinctions as significant. They did not believe that the Child Labor Tax could be revised and made constitutional by removing the scienter requirement, or by moving enforcement entirely into the Department of the Treasury, or by depriving the Treasury of the means of enforcement most suggestive of a punitive sanction. Instead, these reformers read the Court's decision to imply that the problems with the statute ran much deeper. They believed that the Justices had taken the possibility of national regulation of child labor through taxation off the table. Shortly after the *Child Labor Tax Case* was decided, the *New York Tribune* reported the "widely held" view of congressmen that "it will be difficult, if not impossible, to enact a measure which will stand the test of the courts,"³¹⁶ and several commentators on the decision maintained that the

310 *Sebelius*, 132 S. Ct. at 2595.

311 *Id.*

312 *Id.* at 2596. To this the dissenting Justices responded,

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute repeatedly calls a penalty is in fact a tax because it contains no scienter requirement. The *presence* of such a requirement suggests a penalty—though one can imagine a tax imposed only on willful action; but the *absence* of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace.

Id. at 2654 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

313 *Id.* at 2595 (citing *Child Labor Tax Case*, 259 U.S. 20, 36–37 (1922)).

314 *Id.*

315 *Id.* at 2596.

316 *See Ban on Child Labor Bills in Supreme Court Decision*, N.Y. TRIB., May 17, 1922, at 4.

only remaining alternative was a constitutional amendment authorizing congressional regulation of child labor.³¹⁷ Felix Frankfurter, writing in the pages of *The New Republic*, asked, “The door to the Federal action having now been twice shut, what are we to do about child labor, particularly in the stubborn black spots of the South? In my judgment further Federal legislation, under the existing Constitution, is unavailing”³¹⁸ That summer, “the Permanent Conference for the Abolition of Child Labor, representing some

317 See TRATTNER, *supra* note 275, at 163 (“[M]any citizens felt that constitutional reform was the only alternative.”); W.A. Shumaker, *State Child Labor Laws*, 26 L. NOTES 185, 185 (1923) (“Congress has done its utmost, enacting a statute under the commerce power and later one under the taxing power, but both have been held to be invalid. No possibility of federal action remains except through a constitutional amendment”); *The Proposed Child Labor Amendment*, 56 CHI. LEGAL NEWS 385, 389 (1924) (“Since the Supreme Court twice decided Congress did not have the power, under the Constitution, to put a stop to child labor, the only recourse was to submit to the several states an amendment to the Constitution specifically granting Congress the right to regulate child labor.”). The view that a federal child labor amendment to the Constitution was the only means by which Congress might be enabled to regulate the employment of children in the states was shared by later historians. See, e.g., RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA* 179 (1993) (“The Court’s decisions posed the issue in its starkest form: either Congress must give up its attempts to outlaw or penalize child labor or it must use the amending process to establish an unambiguous power to do so.”); BICKEL, *supra* note 24, at 15 (“The Court had just made an end—an unmistakable, final end—to efforts to obtain federal action against child labor.”); *id.* at 18 (stating that “the heavy gate of the Court . . . clanged shut for a generation against federal efforts to root out child labor”); CHAMBERS, *supra* note 275, at 29 (stating that after the *Child Labor Tax Case*, “[a]ll forms of federal action, apparently, were null and void”); DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS* 256 (1996) (“After their second Supreme Court defeat, advocates of federal child labor reform lacked any practical alternative to a constitutional amendment.”); TRATTNER, *supra* note 275, at 142 (explaining that in the *Child Labor Tax Case*, the Court ruled “that it was impossible under the Constitution for Congress or the federal government to correct the injustice”); WOOD, *supra* note 101, at 280 (noting that with the *Hammer* and the *Child Labor Tax Case*, “[t]he doctrine of limited purposes . . . was erected into a well-nigh impenetrable barrier against the exercise of major federal powers for influencing the course of economic development”); *cf.* J.F. Lawson, *Child Labor and the Constitution*, 56 AM. L. REV. 733, 733–34 (1922) (contending that child labor is “involuntary servitude” that Congress may “prohibit” under Section Two of the Thirteenth Amendment, and that such legislation would be preferable to a Child Labor Amendment to the Constitution); Joseph R. Long, *Federal Police Regulation by Taxation*, 9 VA. L. REV. 81, 91, 97 (1922) (contending that a constitutional amendment was “not needed,” as “most of the States had adopted child labor laws and were making rapid progress toward satisfactory legislation on this subject[,]” and as such a child labor amendment “would place still another burden on our already overloaded government at Washington”). The text of Lawson’s proposed bill and a brief in support, along with an endorsement from Samuel Gompers, may be found at *Child Labor: Hearing before the Committee on the Judiciary House of Representatives on H.J. Res. 327*, 67th Cong. 5–11 (1922) [hereinafter 1922 House Hearing].

318 Felix Frankfurter, *Child Labor and the Court*, 26 THE NEW REPUBLIC 248, 249 (1922). Thomas Parkinson obliquely suggested the possibility that a taxing statute revised in some unspecified manner might pass constitutional muster, but predicted that “proponents of child labor legislation . . . will probably prefer to seek an amendment to the Constitution which will make possible what two successive congresses have by large majorities declared

twenty-five national groups with a variety of political and social views . . . decided that the only way to eliminate child labor was by amending the Constitution.”³¹⁹ The board of the National Child Labor Committee concurred, concluding that there was “‘no opportunity to secure legislation regulating child labor by the federal authorities under the present Constitution,’” and “endors[ing] a resolution favoring an active campaign for amendment.”³²⁰ That December, President Warren G. Harding wrote in his second annual message to Congress,

Twice Congress has attempted the correction of the evils incident to child employment. The decision of the Supreme Court has put this problem outside the proper domain of Federal regulation until the Constitution is so amended as to give the Congress indubitable authority. I recommend the submission of such an amendment.³²¹

When the House Judiciary Committee reported back such an amendment in early 1923, its report concluded that in *Hammer* and the *Child Labor Tax Case* the Court had “made the issue clear; either we give up the plan of a Federal minimum and rely solely upon the States, or we undertake to secure a Federal amendment definitely giving to Congress the power to pass a child labor law, since the Supreme Court has found it does not now have that power.”³²² When the Senate Judiciary Committee reported on a similar amendment the following day,³²³ Illinois Republican Senator Joseph Medill McCormick insisted that without such an amendment Congress would be powerless to combat the evil of child labor: “Unless Congress be empowered by a constitutional amendment to act,” he argued, “the evil which had been checked, will grow now. We have no recourse but to amend the Constitution for the sake of the children”³²⁴ Throughout the floor debates over such proposals, senators and representatives repeatedly insisted that the Court

as desirable in the interest of the country’s welfare.” Thomas I. Parkinson, *Child Labor and the Constitution*, 12 AM. LAB. LEGIS. REV. 110, 112–13 (1922).

319 TRATTNER, *supra* note 275, at 164.

320 *Id.*

321 III THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2628, 2638 (Fred L. Israel ed., 1966); *see* 65 CONG. REC. 6353, 7285–86, 7291, 7293 (1924) (statements of Mr. Foster) (discussing child labor); *id.* at 7261–62 (statements of Rep. Major of Missouri) (proposing a child labor amendment); *id.* at 7277–79 (statements of Rep. Perlman) (discussing the proposed child labor amendment); *id.* at 7298–7300 (statements of Rep. Evans of Montana) (discussing child labor); 65 CONG. REC. 9583, 10115–17 (1924) (statements of Sen. Fess) (highlighting child labor issues).

322 H.R. REP. NO. 1694 (67-4), at 2; *see also* 64 CONG. REC. 4445 (1923). This assessment was a verbatim reproduction of the views expressed in the Report of the Chief of the Children’s Bureau. CHILDREN’S BUREAU, U.S. DEP’T OF LABOR, TENTH ANNUAL REPORT OF THE CHIEF, CHILDREN’S BUREAU TO THE SEC. OF LABOR FOR FISCAL YEAR ENDED JUNE 30TH (1922), at 11.

323 S. REP. NO. 1185 (67-4), 64 CONG. REC. 4459–67 (1923).

324 *Id.* at 5345.

had left Congress no alternative but to amend the Constitution.³²⁵ No less

325 See 65 CONG. REC. 7176–77 (1924) (statements of Rep. Foster) (stating that after *Hammer* and the *Child Labor Tax Case*, “[i]t therefore seems to be clearly established that either Congress must abandon the object which was sought in these two laws or the Constitution must be amended so as to give to Congress the power which it was believed to have when these two acts were passed”); *id.* at 7269 (statements of Rep. Dickstein) (repeating Rep. Foster’s statements almost verbatim); *id.* at 7275–76 (statements of Rep. Tillman) (repeating Rep. Foster’s remarks almost verbatim); *id.* at 7251–52 (statements of Rep. Hickey) (“Because of these decisions it is necessary either to amend the Constitution so that Congress will have authority to legislate on this subject or leave the subject of child labor to be dealt with solely by the States.”); *id.* at 7270–71 (statements of Rep. Kelly) (arguing that *Hammer* and the *Child Labor Tax Case* left “only one course open . . . to remove these limitations by submitting an amendment to the Constitution specifically granting to Congress the power to limit, regulate, or prohibit child labor in the United States”); *id.* at 7275 (statements of Rep. Moore) (“As a Federal Government we must either abandon our efforts in this respect or amend the Constitution. . . . [T]he passage of this resolution and its adoption by the legislatures of three-fourths of the several States must be accomplished before the Federal Government can provide any child-labor legislation, the Supreme Court having twice declared that the Congress is without authority to enact child-labor legislation.”); *id.* at 7296 (statements of Rep. Denison) (“The Supreme Court has settled the question as to the power of Congress to enact such legislation under our present constitutional limitations.”); *id.* at 7297 (statements of Rep. Cook) (“Congress is now confronted with the alternative of either abandoning the question entirely or of proposing this amendment.”); *id.* at 7316 (statements of Rep. Thatcher) (“Touching this great question of child welfare, it is true that, as the matter now stands, the States have the sole power—as held by the United States Supreme Court—to deal therewith.”); *id.* at 7306 (statements of Rep. Winter) (“It has become necessary, therefore, to attain this great and vital end of limiting, regulating, and prohibiting child labor to give to the people of the Union, speaking through their legislatures, the opportunity to ratify a constitutional amendment.”); *id.* at 7307 (statements of Rep. Gallivan) (“The Supreme Court made itself very clear as to the power of Congress to legislate against child labor Those who know best have told us that the legislation under consideration is absolutely essential With such a situation in this great land of ours there is but one thing for Congress to do and that is to amend the Constitution.”); *id.* at 7315 (statements of Rep. Rogers) (“[A]ssuming that Congress has done all it possibly could, but in vain, to work out the problem through congressional legislation, the only thing left is a constitutional amendment.”); *id.* at 7168 (statements of Rep. O’Connor) (“[I]f we are to deal effectively with this vital problem from a national standpoint, an amendment to our Constitution is necessary.”); *id.* at 7291–92 (statements of Rep. Tilson) (“It is said, with considerable force, that such an amendment as this is the only adequate means of dealing with the subject.”); *id.* at 7172 (statements of Rep. Larson) (“Deeming such legislation necessary, and having been twice advised by the United States Supreme Court that such legislation—as the Constitution now stands—is not within the power of Congress to enact, we propose that the Constitution be amended so that Congress may have that power.”); *id.* at 7188–89 (statements of Rep. Jacobstein) (stating that after *Hammer* and the *Child Labor Tax Case*, “[t]he only means left was to amend the Constitution, giving Congress the power to wipe out this industrial evil”); *id.* at 9993 (1924) (statements of Sen. Lenroot) (“There is only one other means that can accomplish the object now since the decision of the Supreme Court has been rendered, and that is by a constitutional amendment.”); *id.* at 10, 101–02 (statements of Sen. Shortridge) (“The court seems to have made the issue clear—either to give up the plan of a Federal minimum and rely solely upon the States, or to undertake to secure a Federal amendment definitely giving to Congress the power to pass a child labor law.”). This last quotation was

an authority than North Carolina Democrat William Hammer, the former U.S. Attorney for the Western District of North Carolina and the appellant in *Hammer v. Dagenhart*,³²⁶ announced, “[b]y two decisions of the Supreme Court it has been made clear that Congress does not now have the power to act under the Constitution unless it is amended.”³²⁷

Members of Congress expressing these views could rely on the opinions of distinguished legal scholars. Ohio Republican Israel M. Foster quoted from a letter written by Harvard Law School Dean Roscoe Pound: “I do feel impelled to express my conviction that now that it seems to be established by decisions of the Supreme Court that Congress can not deal with this matter under the Constitution as it stands, a constitutional amendment is imperative.”³²⁸ Similarly, Michigan Republican Earl Michener quoted from a letter from Dean Henry Bates of the University of Michigan Law School:

I venture to write to you in support of the proposed amendment relating to child labor

As you well know, all efforts to secure valid congressional legislation on this subject without amendment to the Constitution have failed. There is no other recourse, if we are to meet this serious evil, than to amend the Constitution.³²⁹

This opinion was perhaps expressed most colorfully by the redoubtable Florence Kelley in her testimony before the House Judiciary Committee at the second session of the 67th Congress. Referring to *Hammer* and the *Child Labor Tax Case*, Kelley testified that she was “convinced out of the twofold experiences that we have had that we should be childish and fatuous to attempt again by the method of Federal legislation . . . to give to our children the privileges this country promised to all of them.”³³⁰ Instead, Kelley stated that she looked “forward with ardent hope to a Federal amendment authorizing Congress to legislate.”³³¹ Republican Ira Hersey of Maine, seeking to clarify Kelley’s position, asked, “[w]ould you rather the committee should pass another law of Congress without the constitutional amendment and put

taken directly from the Tenth Annual Report of the Secretary of Labor, James J. Davis, the relevant portion of which is reproduced at the 1923 Senate hearings, *Child Labor Amendment to the Constitution: Hearings Before a Subcomm. of the Comm. on the Judiciary on S.J. Res. 200, S.J. Res. 224, S.J. Res. 232, S.J. Res. 256, and S.J. Res. 262*, 67th Cong. 20 (1923). Davis wrote to Shortridge on January 6, 1923, that “the decision of the court makes it clear that Congress is without power at this time to legislate on the subject of children in industry, and that an amendment to the Constitution is necessary in order to permit Congress to deal with the subject. The efforts of Congress heretofore have exhausted, it would seem, every possible avenue under the Constitution, and all have been declared ineffective.” The letter is reproduced the hearings transcript. *Id.* at 17.

326 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

327 65 CONG. REC. 10,408 (1924).

328 *Id.* at 7181.

329 *Id.* at 7268.

330 1922 House Hearing, *supra* note 317, at 17 (statement of Florence Kelley, representing the Consumers’ League).

331 *Id.* at 18.

it up to the Supreme Court, or would you rather we should pass or submit an amendment to the Constitution?”³³² To this the exasperated Kelley responded:

No, sir: I would be glad to say that in recent years we have come to believe that the moron is a person who is incapable of learning by experience. We have tried twice with the advice of the wisest lawyers whom we could summon to our aid . . . to frame laws that the Supreme Court would uphold, and having failed twice, I think we would enlist ourselves among the morons if we spent another 40 years experimenting in the field of Federal legislation.³³³

In short, contemporary observers deeply engaged with the issue of federal child labor reform did not believe that the Child Labor Tax could be revised so as to pass constitutional muster by eliminating the scienter feature, or by placing enforcement entirely in the Department of the Treasury, nor by decreasing or more carefully tailoring the burden of the exaction. They believed any such efforts to frame and enact a revised taxing measure that could run the judicial gauntlet would be futile. Rather than eliminating the distinguishing features of the Child Labor Tax identified by Chief Justice Roberts, therefore, they instead turned their attention to an effort to amend the Constitution to empower Congress to enact federal child labor legislation.

C. *The Question of Lawfulness*

A crucial point of agreement between Chief Justice Roberts and the dissenting Justices can be found in the test they employed in discerning whether the exaction imposed by the ACA was a tax or a penalty. “In distinguishing penalties from taxes,” the Chief Justice wrote, the “Court has explained that”³³⁴ a penalty is “‘punishment for an unlawful act or omission,’”³³⁵ “‘an exaction imposed by statute as punishment for an unlawful act.’”³³⁶ With this the dissenting Justices concurred: “Our cases establish a clear line between a tax and a penalty: ‘[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.’”³³⁷ Thus, for both Chief Justice Rob-

332 *Id.*

333 *Id.*; see also CHAMBERS, *supra* note 275, at 33–34 (stating that in Kelley’s view, there was “but one course of action open—amendment of the federal Constitution explicitly to authorize Congress to enact national child-labor regulations.”).

334 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012).

335 *Id.* (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

336 *Id.* (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)).

337 *Id.* at 2651 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (alterations in original) (quoting *Reorganized CF&I*, 518 U.S. at 224).

erts and the dissenters, the issue was whether the ACA made the failure to maintain minimum essential coverage unlawful.³³⁸

For the dissenting Supreme Court Justices, the question was, “quite simply, whether the exaction here is imposed for violation of the law.”³³⁹ To this they answered, “It unquestionably is.”³⁴⁰ They noted that the statute “commands that every ‘applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage[.]’” and proceeded to document a number of instances in which the statute speaks in terms of a

338 Two lower court judges had explicitly addressed this issue. Though he did not directly confront the *Child Labor Tax Case* in his dissenting opinion in *Seven-Sky v. Holder*, Judge Kavanaugh maintained that the shared responsibility payment would be a constitutional exercise of the taxing power under *Sonzinsky* and *Sanchez* so long as the individual mandate were not interpreted to make the failure to purchase insurance unlawful. 661 F.3d 1, 47–50 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits), *abrogated by Sebelius*, 132 S. Ct. 2566 (2012). But Judge Kavanaugh did believe that the minimum coverage provision might plausibly be read to make failure to acquire insurance illegal. That provision, Judge Kavanaugh pointed out, “arguably does not just incentivize certain kinds of lawful behavior but also mandates such behavior. . . . Therefore, beginning in 2014, a citizen who does not maintain health insurance might be acting *illegally*.” *Id.* at 48. This uncertainty on the issue of whether the ACA made failure to acquire insurance unlawful had led Judge Kavanaugh to question whether the shared responsibility payment could be “squeeze[d] . . . within the Taxing Clause.” *Id.* at 48 n.38. Judge Sutton did not explicitly conclude that the ACA made failure to purchase insurance unlawful, though he did quote it as imposing a “requirement” to do so. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 551–52 (6th Cir. 2011) (Sutton, J., concurring in part). A “‘tax,’” Judge Sutton explained, “‘is an enforced contribution to provide for the support of government.’” *Id.* at 550 (quoting *La Franca*, 282 U.S. at 572). Its “central objective” is to “‘obtain[] revenue.’” *Id.* at 550 (alteration in original) (quoting *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)). By contrast, a “‘penalty’ . . . regulates conduct by establishing ‘criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.’” *Id.* (quoting *Child Labor Tax Case*, 259 U.S. at 38). The latter, Judge Sutton concluded, was precisely what the minimum coverage provision did. It operated by “starting with a substantive provision that ‘adopt[s] the criteria of wrongdoing,’” *id.* at 552 (alteration in original) (quoting *Child Labor Tax Case*, 259 U.S. at 20), “which states that every ‘applicable individual shall’ have health insurance.” *Id.* (quoting 26 U.S.C. § 5000A(a) (Supp. V 2011)). It then “spell[ed] out the ‘principal consequence on those who transgress its standard’ . . . which is to impose a penalty” on those who failed to meet that requirement. *Id.* at 552 (quoting *Child Labor Tax Case*, 259 U.S. at 38). This gave the minimum coverage provision “the ‘characteristics of regulation and punishment’ . . . not taxation.” *Id.* (quoting *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994)). Judge Sutton nevertheless thought it

easy to envision a system of national health care, including one with a minimum-essential-coverage provision, permissibly premised on the taxing power. Congress might have raised taxes on everyone in an amount equivalent to the current penalty, then offered credits to those with minimum essential insurance. Or it might have imposed a lower tax rate on people with health insurance than those without it. But Congress did neither of these things, and that makes a difference.

Id. at 550.

339 *Sebelius*, 132 S. Ct. at 2652 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

340 *Id.*

“requirement” to maintain minimum essential coverage.³⁴¹ This conclusion was reinforced by the fact that “[e]ighteen times” the statute refers to the shared responsibility payment as a “penalty.”³⁴² The Court, the dissenters pointed out, had “never held that *any* exaction imposed for violation of the law is an exercise of Congress’ taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty.”³⁴³ The dissenters reiterated, “We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty.”³⁴⁴

The dissenting Justices dismissed the Government’s contention that the statute imposed no legal duty to acquire health insurance. “In the face of all these indications of a regulatory requirement accompanied by a penalty,” the dissenters noted,

the Solicitor General assures us that ‘neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation,’ and that ‘[i]f [those subject to the Act] pay the tax penalty, they’re in compliance with the law’ [t]hese self-serving litigating positions,

the Justices asserted, “are entitled to no weight. What counts is what the statute says, and that is entirely clear.”³⁴⁵ The Court could not “rewrite the statute to be what it is not.”³⁴⁶ The ACA offered a “mountain of evidence that the minimum coverage requirement is what the statute calls it—a requirement—and that the penalty for its violation is what the statute calls it—a penalty.”³⁴⁷ There was “simply no way, ‘without doing violence to the fair meaning of the words used,’ . . . to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.”³⁴⁸ The terms of the statute “rende[red] it ‘unavoidable’ . . . that Congress imposed a regulatory penalty, not a tax. For all these reasons, to say that the Individual Mandate merely imposes a tax [was] not to interpret the statute but to rewrite it.”³⁴⁹

On this question of whether the statute imposed a legal duty to maintain minimum essential coverage, Chief Justice Roberts disagreed. “While the individual mandate clearly aims to induce the purchase of health insurance,” he wrote,

341 *Id.* (alterations in original) (quoting 26 U.S.C. § 5000A (Supp. V 2011)).

342 *Id.* at 2653 (quoting 26 U.S.C. § 5000A(b)).

343 *Id.* at 2651.

344 *Id.* at 2653. The dissenters asserted that in some cases “this Court has held that a ‘tax’ imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax.” *Id.* at 2651.

345 *Id.* at 2653 (alterations in original) (citations omitted).

346 *Id.* at 2651.

347 *Id.* at 2654.

348 *Id.* at 2651 (citation omitted).

349 *Id.* at 2655 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448 (1830)).

it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.³⁵⁰

Thus, Chief Justice Roberts concluded, “the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.”³⁵¹

This interpretive dispute was in my view an unnecessary detour for two reasons. First, earlier in its opinion, the Court had held that the individual mandate could be sustained neither as an exercise of Congress’s commerce power,³⁵² nor as an exercise of its power under the Necessary and Proper Clause.³⁵³ Because Congress had no enumerated power to make the failure to purchase minimum essential coverage illegal, the failure to purchase such coverage *could not* be illegal. The shared responsibility payment therefore could not be a “‘punishment for an unlawful act,’”³⁵⁴ because the failure to purchase minimum essential coverage is not and could not be made an unlawful act.

Second, this interpretive dispute was misguided because it proceeded from a definition of a penalty taken from a 1931 case seeking to determine whether an exaction imposed additional punishment for a crime in violation of the Double Jeopardy Clause.³⁵⁵ That proceeding involved a civil action to collect a tax for sales of liquor that were made illegal by the National Prohibition Act, and for which the respondent already had been convicted and punished in a separate criminal prosecution.³⁵⁶ There was no doubt there that Congress had power under the Eighteenth Amendment to make the sales involved unlawful. But the definition of a penalty adopted in that case was never controlling in the *Child Labor Tax Case* and its progeny, which held that putative taxes were penalties even though the conduct triggering the tax was

350 *Id.* at 2596–97 (majority opinion).

351 *Id.* at 2597. Chief Justice Roberts stated,

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. . . . That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes

Id. at 2593–94 (citation omitted). He stated further that “imposition of a tax . . . leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.” *Id.* at 2600.

352 *Id.* at 2591.

353 *Id.* at 2593.

354 *Id.* at 2596 (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

355 *United States v. La Franca*, 282 U.S. 568, 572 (1931).

356 *Id.* at 572–73.

not unlawful. Indeed, those putative taxes had been imposed on the conduct in question precisely *because* Congress had no power to make such conduct unlawful.

Thus, even if Chief Justice Roberts's interpretation of the statute is the correct one, this feature of the ACA does not distinguish it from the Child Labor Tax. Indeed, in his brief before the Court in the *Child Labor Tax Case*, Solicitor General James Beck contended, unsuccessfully, that an exaction was a penalty "where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act," but was a tax where the exaction merely imposed an excise on the privilege of performing a legal act.³⁵⁷ Beck pointed out that the Child Labor Tax did not "pretend to . . . prohibit the employment of child labor. If a manufacturer desires to employ such labor, he is free to do so; but, if he does so, he must pay an excise tax for the privilege."³⁵⁸ The Child Labor Tax left the manufacturer free to exercise "his undoubted right to employ child labor."³⁵⁹ The statute, Beck maintained, "does not prohibit child labor. It merely requires the manufacturer who employs child labor to pay a tax not imposed upon one who does not employ child labor."³⁶⁰ Yet this argument was unavailing.

Indeed, in his opinion for the Court, Chief Justice Taft recognized that the Child Labor Tax did not "expressly declare that the employment within the mentioned ages is illegal."³⁶¹ As the dissenting Justices in *Sebelius* suggested, the ACA might at least plausibly be interpreted as intended to impose a legal duty to acquire and maintain minimum essential coverage.³⁶² By contrast, as Chief Justice Taft recognized, there was no plausible argument in the *Child Labor Tax Case* that entities employing child labor were thereby violating federal law.³⁶³ Nevertheless, the Court there concluded that the putative tax was in fact a regulatory penalty.³⁶⁴ Neither did the Futures Trading Act make it unlawful to enter into contracts for future delivery other than on boards of trade designated as contract markets by the Secretary of Agriculture.³⁶⁵ Nevertheless, in *Hill v. Wallace* the Court held the tax imposed by that Act to be a regulatory penalty.³⁶⁶ Nor did the Bituminous Coal Conser-

357 *Child Labor Tax Case*, 259 U.S. 20, 21–22 (1922).

358 *Id.* at 22.

359 *Id.* at 25.

360 *Id.* at 22.

361 *Id.* at 38. Taft did assert that the statute exhibited "its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard." *Id.* But as Judge Sutton argued, the ACA did precisely the same thing, by imposing the shared responsibility payment on those who failed to meet the statute's requirement to acquire health insurance. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 552 (6th Cir. 2011) (Sutton, J., concurring in part).

362 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2644, 2651 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

363 *Child Labor Tax Case*, 259 U.S. at 38.

364 *Id.* at 37.

365 *Hill v. Wallace*, 259 U.S. 44, 45, 63–64 (1922).

366 *Id.* at 66.

vation Act of 1935 make it illegal to mine or sell coal on terms other than those prescribed by the Bituminous Coal Code.³⁶⁷ Yet in *Carter Coal* the Court held that the tax imposed by that statute was a regulatory penalty.³⁶⁸ None of these statutes made failure to abide by their regulatory schemes unlawful. They merely made a payment to the government the price of refusing to submit. Nevertheless, the Court in each instance held that those exactions were regulatory penalties rather than true taxes. The *Child Labor Tax Case* and its progeny make it clear that it is not necessary for an exaction to be deemed a penalty that the conduct taxed be unlawful. Unlawfulness may be sufficient to support the conclusion that an exaction is a regulatory penalty, but it is not a necessary condition.³⁶⁹

To sum up, then, the Child Labor Tax did not make the employment of child labor unlawful; it did raise revenue; it did not in fact prevent the employment of child labor; and its proponents did not think that it could be salvaged by lowering the rate, by a more narrow tailoring of the tax, by excising the scienter requirement, or by moving enforcement entirely into the Department of the Treasury. What was it, then, that made the Child Labor Tax an unconstitutional penalty, and why did contemporary child labor reformers regard the prospect of a revised Child Labor Tax that would pass constitutional muster as a delusion?

367 *Carter v. Carter Coal Co.*, 298 U.S. 238, 278–79 (1936).

368 *Id.* at 310, 316.

369 Indeed, even Chief Justice Taft's references to "wrongdoing" and "transgress[ion]" must be handled with care. *Child Labor Tax Case*, 259 U.S. at 38. Like Judge Sutton in *Thomas More Law Center*, the dissenting Justices maintained that "[w]hen an act 'adopt[s] the criteria of wrongdoing' and then imposes a monetary penalty as the 'principal consequence on those who transgress its standard,' it creates a regulatory penalty, not a tax." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651–52 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (quoting *Child Labor Tax Case*, 259 U.S. at 38). But as we have just seen, under the *Child Labor Tax Case* and its progeny, it is clear that such "wrongdoing" need not be illegal for the exaction to be a penalty. And if instead all that is meant by "wrongdoing" is conduct sufficiently threatening to public health, safety, morals, or welfare that its prohibition would not violate the Constitution, then the criterion will not suffice to explain the pattern of the Court's taxing power decisions. For the "wrongful" acts of manufacturing oleomargarine, of engaging in the business of gambling, and of selling opium, marijuana, or sawed-off shotguns all could be criminalized without depriving those engaged in the conduct of any constitutionally protected rights. See, e.g., *United States v. Miller*, 307 U.S. 174, 176–77, 183 (1939) (certain firearms); *Champion v. Ames*, 188 U.S. 321, 363–64 (1903) (lotteries); *Powell v. Pennsylvania*, 127 U.S. 678, 686–87 (1888) (oleomargarine); *Stone v. Mississippi*, 101 U.S. 814, 821 (1880) (lotteries). And yet the Court had upheld the taxation of each of these forms of "wrongdoing," while the Justices had invalidated taxation of firms employing child labor even though the employment of such labor was also sufficiently "wrongful" to be subject to prohibition by the state's police power. See *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 321, 324–26 (1913) (holding constitutional the Child Labor Act of Illinois of 1903). Clearly, whether an exaction was triggered by some form of legal or moral "wrongdoing" was not sufficient to distinguish a valid tax from a regulatory penalty.

V. THE ANALYSIS OF THOMAS REED POWELL

For illumination of this question, let us turn to the reaction of one of the period's most astute contemporary commentators on constitutional law. Perhaps predictably, the *Child Labor Tax Case* had both detractors³⁷⁰ and defenders.³⁷¹ Interestingly, the latter group included prominent critics of *Hammer*, who continued to maintain that the first *Child Labor Case* had been decided incorrectly, but that the *Child Labor Tax Case* had reached the correct result.³⁷² Among this group was Thomas Reed Powell, then a professor at Columbia University Law School. In 1922 Professor Powell published two articles analyzing the *Child Labor Tax Case*. One was a review of the Supreme Court's constitutional decisions during the preceding term, published in the *Michigan Law Review*,³⁷³ the second was devoted entirely to the child labor decisions, and was published in the inaugural issue of the *North Carolina Law Review*.³⁷⁴ Powell began the section of the *Michigan* article discussing the Child Labor Tax with a riddle: "'When is a tax not a tax?'" In the *Child Labor Tax Case*, he reported, the Court had given the following answer to that "conundrum": "When from the face of the statute it appears that a prohibitory or regulatory penalty has been imposed for a departure from a detailed and specified course of conduct in business."³⁷⁵ Notice that Powell described the penalty disjunctively, as "prohibitory *or* regulatory." Chief Justice Taft had said of the Child Labor Tax that "its prohibitory *and* regulatory

370 See Edward S. Corwin, *Constitutional Law in 1921-1922: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1921*, 16 AM. POL. SCI. REV. 612, 612-16 (1922) (discussing the *Child Labor Tax Case*); Parkinson, *supra* note 318, at 110-13 (addressing the outcome in the *Child Labor Tax Case*).

371 See Walter F. Dodd, *The Growth of National Power*, 32 YALE L.J. 452, 453-54 (1923) (discussing the decision and federal power); Long, *supra* note 317, at 81 (addressing the taxing power in relation to the *Child Labor Tax Case*); *The Supreme Court Rescues the Constitution*, 6 CONST. REV. 180 (1922) (supporting the decision); J.E. Peyser, Case Comment, *Constitutional Law: Child Labor Law: Taxing Power as a Means of Regulation*, 10 CAL. L. REV. 501, 503-04 (1922) ("[T]he rules and their applications were correctly employed, for the history of the legislation, as well as the face of the statute itself, reveals its purpose. The fact that it was not intended as a revenue measure, but merely to effect a penalty for disregard of a Congressional regulation, is so evident that 'a court must be blind not to see it.'" (citation omitted)).

372 See Frankfurter, *supra* note 318, at 248 (addressing the issue of child labor and the Court's recent decisions); Powell, *supra* note 269, at 72 (discussing the *Child Labor Tax Case* decision); William A. Sutherland, *The Child Labor Cases and the Constitution*, 8 CORNELL L.Q. 338, 338 (1922) ("It is the opinion of the writer that Justices McKenna, Holmes, and Brandeis were right in both cases; that the first act should have been held constitutional, while the second act was properly held unconstitutional. . . . The case of *Bailey v. Drexel Furniture Co.* . . . was correctly decided and marks a return by the court to sound principles in dealing with the taxing clause of the Constitution.").

373 Thomas Reed Powell, *The Supreme Court's Adjudication of Constitutional Issues in 1921-1922*, III, 21 MICH. L. REV. 290, 290 (1922) (discussing the issue of taxation in the *Child Labor Tax Case*).

374 Powell, *supra* note 269.

375 Powell, *supra* note 373, at 290.

effect and purpose are palpable,” and it appeared to Powell that “one of the necessary links in the chain leading to the decision was that the burden of the exaction was so onerous” that this regulatory character was clear.³⁷⁶ But Powell recognized that the Child Labor Tax “was not completely prohibitive,” as “[s]ome concerns might prefer to pay an added ten per cent of their profits rather than to deny to children the opportunity to aid in supporting themselves and their family.”³⁷⁷ Moreover, he pointed out, “[o]ne of the cases which came before the court was a suit to recover a tax that had been paid.”³⁷⁸ Thus, “[o]ne point that appears plainly from the *Child Labor Tax Case* is that a federal statute which in form imposes an excise may be a regulation rather than a tax even though it yields some revenue.”³⁷⁹ Therefore, he concluded, “the decision could not rest on a principle that taxation must be for revenue.”³⁸⁰ “It rests rather on the detailed specification of the conditions subjecting employers to a tax sufficiently onerous to induce them generally to alter the conduct of their business so as to eliminate the elements giving rise to the demand.”³⁸¹

376 Powell, *supra* note 269, at 80 (emphasis added) (citation omitted).

377 *Id.* at 71.

378 *Id.*

379 *Id.* at 80. “The child labor statute could not be declared unconstitutional on the ground that it was not a revenue producing measure, for the case before the court was a suit to recover back a tax that had been paid.” *Id.* Powell did recognize that the Child Labor Tax was not actually intended to raise revenue: “Its proponents were the exterminators of child labor and not the financiers of the government. Those who lament its failure to pass muster with the court are led by Mr. Lovejoy, not by Mr. Mellon.” *Id.* at 70–71. In advocating for the Child Labor Tax in Congress, Senator Pomerene had argued, “[W]e saw fit to draft this provision for the purpose of raising revenue and at the same time to meet the child-labor problem.” 57 CONG. REC. 613 (1918). Other senators, however, insisted that the provision was not truly for the purpose of raising revenue. Senator Lodge, one of the principal proponents of the exaction, admitted that “[t]he amount of revenue to be raised by this measure may be little or nothing. The main purpose is to put a stop to what seems to be a very great evil.” *Id.* at 611; *see also id.* at 609 (statement by Sen. Hardwick) (explaining that the tax “is not levied in this case[] for the real purpose of raising revenue”).

380 Powell, *supra* note 373, at 291. Powell did believe, however, that an exaction whose “success as an income producer to the government is considerable and notorious” could in the future be sustained as a tax rather than a penalty with “little difficulty.” Powell, *supra* note 269, at 80.

381 Powell, *supra* note 373, at 291–92; *see also* Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 90 (2012) (noting that “[e]ven in its most constrained approach to the tax power in the 1920s and 1930s,” the Court “consistently refused to invalidate tax measures simply because they were motivated by a regulatory purpose” and that “[i]nstead, decisions like *The Child Labor Tax Case* . . . underscored that the high levels of the putative taxes at issue meant they were really penalties in disguise, aimed at compelling adherence to detailed regulatory schemes that Congress lacked authority to impose”); *cf.* Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners (Minimum Coverage Provision), *supra* note 240, at 10 (“[D]uring the 1920s and 1930s the Court did invalidate some federal taxes on the ground that they had been adopted primarily to enforce compliance with a regulatory program that exceeded Congress’s authority under

Thus, Powell identified two essential distinguishing features of a penalty: a departure from a detailed and specified course of conduct, and an exaction sufficiently onerous to induce the alteration of behavior.³⁸² At the same time, Powell seemed to recognize that the second of these criteria was less central. After all, as some pointed out, the oleomargarine tax imposed a levy on colored oleomargarine forty times the tax on uncolored oleomargarine, and that exaction was nevertheless a tax rather than a penalty.³⁸³ A “heavy exaction” alone clearly was not sufficient to make an ostensible tax a penalty.³⁸⁴ And “if the present [child labor] tax had been sustained,” Powell

the then-prevailing interpretation of the Commerce Clause. . . . Even if the Court’s *Lochner*-era decisions retained some force today, they would merely support invalidating as pretextual a tax so high as to amount to a coercive penalty to compel compliance with a regulatory scheme that falls wholly outside Congress’s other enumerated powers. That was the situation addressed by those decisions, and that is how the Court has interpreted them since then.”). Powell suggested that the detailing and specification of a course of conduct would be fatal only where the regulatory features of the statute were “unrelated to any fiscal object.” Powell, *supra* note 260, at 78–79. By this he meant that the regulatory features of the statute were not related to the collection of an otherwise valid exaction, as the Court had held that they were in *Doremus*. *Id.* at 79–80. Powell read Taft to say that regulations annexed to a tax law must themselves bear a close “relation to the primary fiscal purpose of getting a revenue,” and concluded that “the child labor tax law on its face imposes such detailed tests of taxability unrelated to any fiscal object that its predominant characteristic is that of a regulatory measure.” *Id.* at 77. Powell surely recognized that the proponents of the Child Labor Tax had offered what they regarded as “fiscal reasons” for taxing firms employing child labor. As Solicitor General Beck argued in the *Child Labor Tax Case*, “I do not concede that no fiscal reason can be assigned, which justifies the Child Labor Law as a revenue measure. It is notorious that child labor is cheap labor, and this being so, Congress may have considered this privilege of cheaper production as a fiscal reason for the tax.” Brief on Behalf of Appellants and Plaintiff in Error at 21, *Child Labor Tax Case*, 259 U.S. 20 (1922) (No. 657); *see also* Corwin, *supra* note 370, at 613–14 (“Concerns which employ child labor occupy a degraded plane of competition and presumably enjoy special profits in consequence; why then, should not these profits be subject to special exactions by the taxing-power, whether national or local?”).

382 Cf. Samuel A. Goldberg, Note, *The Unconstitutionality of the Federal Tax on Employers of Child Labor*, 71 U. PA. L. REV. 54, 57 (1922) (“The Child Labor Act, if it differs at all from the previous acts which had been upheld, does so by combining in itself all the elements which aroused objection in the other acts severally—excessive amount of tax, taxing a process of business, accompanying provisions for detailed specifications and inspections. To these are added the elements of knowledge of the taxpayer and the fact that the tax must be paid whether one or many children are employed. Granting that all these elements strongly indicate the prohibitive feature of the act, based solely on precedent the act could have been held constitutional.” (citations omitted)).

383 Note, *State Rights and the Child Labor Tax Law*, 22 COLUM. L. REV. 659, 660–61 (1922) (“As to the ‘heavy exaction to promote the efficacy of the [sic] regulation,’ it is perhaps enough to say that oleomargarine not manufactured in the way and under the conditions desired, was taxed forty times as highly as other oleomargarine.” (quoting *Child Labor Tax Case*, 259 U.S. 20, 42 (1922))).

384 *See* Long, *supra* note 317, at 82 (“It is no objection to the constitutionality of a tax that it is fixed so high as to suppress the thing taxed.”).

conjectured, "it would be almost impossible to balk" at a tax imposing a higher rate.³⁸⁵ Thus, Powell remarked,

[t]he burden of the tax will always be an element to consider, but it seldom can be exclusively controlling. A very slight burden may be enough to induce abandonment of the taxable enterprise or the taxable mode of conducting it. A heavy burden may be borne for a number of years before readjustment is feasible.³⁸⁶

"Perhaps," he concluded, "after all, the most workable test will be the character and extent of the particulars which are the basis of taxability," and whether those particulars bore a "reasonable relation to any fiscal purpose."³⁸⁷

It was this idea, Powell maintained, that lay at the core of the Chief Justice's opinion. Taft had distinguished the tax upheld on state bank notes in *Veazie Bank v. Fenno* by observing that "'the sole objection'" to that tax "'was its excessive character. . . . There were no elaborate specifications on the face of the act, as here, indicating the purpose to regulate matters of state concern through an exaction so applied as to give it the qualities of a penalty for violation of law rather than a tax.'"³⁸⁸ Similarly, Taft had argued, the oleomargarine law upheld in *McCray* did not "'show on its face,'" as did the Child Labor Tax, "'the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.'"³⁸⁹ In both of those cases, the exaction had been heavy, but it had not been coupled with "'elaborate'"³⁹⁰ or "'detailed specifications of a regulation of a state concern.'"³⁹¹ These distinctions made it clear to Powell that the criteria of taxability "must be rather narrowly confined to the identification of the selected commodity by some of its inherent and continuing characteristics, and may not include detailed specifications of the conditions under which the commodity is made."³⁹² *Hill v. Wallace*, which the same day had invalidated a tax imposed in the absence of "fulfilment [sic] of detailed requirements set forth in the statute and in administrative regulations," made this requirement "certain."³⁹³ Thus, Powell concluded, "Chief Justice Taft says that a statute which on its face imposes detailed police regulations of a sufficiently extensive character is not an exercise of the federal taxing power."³⁹⁴

It was this understanding that continued to inform the Court's later decisions on the scope of the taxing power. In *Sonzinsky*, where the exaction

385 Powell, *supra* note 269, at 71.

386 *Id.* at 80.

387 *Id.* at 80–81.

388 *Id.* at 75 (quoting Child Labor Tax Case, 259 U.S. at 41).

389 *Id.* at 72 (quoting Child Labor Tax Case, 259 U.S. at 42).

390 *Id.* at 75 (quoting Child Labor Tax Case, 259 U.S. at 41).

391 *Id.* at 72 (quoting Child Labor Tax Case, 259 U.S. at 42).

392 *Id.*

393 *Id.* (citing *Hill v. Wallace*, 259 U.S. 44 (1922)).

394 *Id.* at 76.

was so significant that fewer than thirty people nationwide paid it,³⁹⁵ the Government argued that decisions such as the *Child Labor Tax Case* and *Hill v. Wallace* were “distinguishable [because] [t]hey involve[d] penalties for failure to comply with federal regulations deemed to be beyond the power of Congress.”³⁹⁶ Justice Stone’s opinion for the *Sonzinsky* Court observed that “[t]he case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations.”³⁹⁷ Justice Stone thus concluded, “[a]s it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.”³⁹⁸ Similarly, in his dissenting opinion in *Kahriger*, Justice Frankfurter understood the *Child Labor Tax Case* to stand for the proposition that “[a] nominal taxing measure must be found an inadmissible intrusion into a domain of legislation reserved for the States . . . when Congress requires that such a measure is to be enforced through a detailed scheme of administration beyond the obvious fiscal needs.”³⁹⁹

In other words, as Professors Bickel and Wood recognized, subsequent decisions did not impair or modify the conception of the tax/penalty distinction that undergirded the *Child Labor Tax Case* opinion. To be sure, the expansion of the commerce power narrowed the range of instances in which that distinction would be relevant: if an ostensible excise was imposed in order to encourage compliance with a regulation that Congress was empowered to enact under the Commerce Clause, it would not matter whether the imposition was categorized as a tax or as a penalty. But the distinction itself, though dormant, remained unaltered. The doctrine that a penalty unsupported by another enumerated power was unconstitutional therefore persisted, and would again become relevant were Congress to enact legislation that could not be sustained as an exercise of another of its enumerated powers. And that, of course, is precisely what Chief Justice Roberts and the joint dissenters had held with respect to the shared responsibility payment in the portion of their opinion dealing with the commerce power.

Powell agreed that the features of the tax to which Taft called attention “amply supported” the view that “the child labor tax law on its face imposes such detailed tests of taxability unrelated to any fiscal object that its predominant characteristic is that of a regulatory measure.”⁴⁰⁰ And he recognized that some of the “features which stamp the child labor act as a regulatory measure”—the scienter requirement, the provision for factory inspection by “the Secretary of Labor and his subordinates,” and the failure to proportion

395 *Sonzinsky v. United States*, 300 U.S. 506, 514 n.1 (1937).

396 *Id.* at 510–11.

397 *Id.* at 513.

398 *Id.* at 514.

399 *United States v. Kahriger*, 345 U.S. 22, 39 (1953) (Frankfurter, J., dissenting), *overruled in part by* *Marchetti v. United States*, 390 U.S. 39 (1968).

400 Powell, *supra* note 269, at 77. “[N]o honest judgment can find fault with the discernment of the court in the present case.” *Id.* at 78.

the tax to the extent of the employment of child labor—"of course might be eliminated from other efforts to accomplish the same result."⁴⁰¹ But the other provisions, imposing age restrictions and limitations on hours of work, were "practically essential to any scheme of regulation."⁴⁰² It is little wonder, then, that proponents of federal child labor reform held out scant hope that a revised taxing measure could survive judicial review.

Powell credited Taft with fully recognizing "that the distinction between a tax and a police regulation is not sharp and clear, and that a statute may have the characteristics of both so that the problem is to determine which predominate."⁴⁰³ The problem was "one of degree" and the solution was "far from an easy one."⁴⁰⁴ As Taft put it, the "'difference'" was "'sometimes difficult to define.'"⁴⁰⁵ An "'incidental motive'" to discourage certain conduct by making its "'continuance onerous'" did not cause an exaction with "'the primary motive of obtaining revenue'" to lose its "'character'" as a tax.⁴⁰⁶ "But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."⁴⁰⁷ As Powell summarized the matter,

This does not say that police regulations annexed to a tax law necessarily deprive it of the character of an exercise of fiscal power. It puts for a test the extent and character of such police regulations and the closeness of their relation to the primary fiscal purpose of getting a revenue.⁴⁰⁸

Notwithstanding the difficulty of the inquiry, Powell thought that it was necessary if the federal system was to be preserved. Powell agreed that "a

401 *Id.* at 77.

402 *Id.* at 77-78 (citing *Child Labor Tax Case*, 259 U.S. 20, 36 (1922)). "Plainly, therefore, Congress could not remove the taint from the child labor tax by changing it from a tax on income to a specific exaction on the manufacture or sale of goods produced by child labor, or in mines or factories in which children work." *Id.* at 72.

403 *Id.* at 76.

404 *Id.* at 77.

405 *Id.* (quoting *Child Labor Tax Case*, 259 U.S. at 38).

406 *Id.* (quoting *Child Labor Tax Case*, 259 U.S. at 38). Powell made clear his understanding that Taft was using the term "purpose" to refer not to "something inside the heads of congressmen and senators," but to "something apparent from what they have put on the statute book." *Id.* at 76. Powell insisted that Taft gave "full recognition" to the "canon against judicial assumption of congressional motives," *id.* at 75, excluding "judicial inquiry into any realm to which he is not led by the language of the law." *Id.* at 76. Taft's position was that it was proper for the Court to consider "'purpose' to the extent that it appears on the face of the law"—to consider purpose "as something apparent from what . . . [congressmen and senators] have put on the statute book." *Id.* "The court does not care about the end aimed at except so far as it is accomplished. The functional use of the word 'purpose' . . . is the same as though the Chief Justice had said 'necessary effects or results.'" *Id.* There was a "difference between sticking to the statute and going outside it," *id.* at 75, and Taft did not engage in "judicial speculation on matters extrinsic to what Congress has actually said and done." *Id.* at 76.

407 *Id.* at 77 (quoting *Child Labor Tax Case*, 259 U.S. at 38).

408 *Id.*

federal excise, in form a tax, may be in substance a police regulation so obviously unrelated to any fiscal enterprise as to be outside the taxing power vested in Congress. No one with sense can deny the substantial wisdom of this.”⁴⁰⁹ On the need to draw “some line . . . between form and substance” in the exercise of the taxing power, Powell argued,

[T]here can be no debate unless one is to conceive of the federal system ordained by the Constitution as one giving Congress full power of police throughout the country, provided only this power is exercised under some other name than that of police. Such a conception may find support in fine-spun formalistic reasoning, but it so violates history and common sense that it may be dismissed without more ado.⁴¹⁰

Powell fully agreed with Taft that a decision upholding the tax would have led down a slippery slope to plenary congressional authority. Powell observed,

Such a tax . . . if successful, would be a precedent for the constitutionality of similar depressive exactions on enterprises paying less than a prescribed minimum wage, working labor more than a prescribed number of hours per day or per week, failing to comply with standards of safety or with any other police tests laid down by Congress as a discrimen between taxability and non-taxability.⁴¹¹

The Court’s decision, Powell concluded, “was essential to safeguarding the federal system from being warped beyond recognition.”⁴¹²

Powell thus read the *Child Labor Tax Case* as establishing the proposition that the values of federalism could be preserved in taxing power jurisprudence only through the application of a standard rather than through enforcement of a rule. *Sebelius* provides an opportunity to reflect on that view. The dissenting Justices maintained that the shared responsibility payment was a penalty rather than a tax because it imposed an exaction as punishment for an unlawful act. Accepting this definition of the distinction between a tax and a penalty made the issue turn on whether the ACA in fact made the failure to maintain minimum health coverage illegal. Because the dissenters believed that the ACA clearly did so, their formulation of the tax-penalty distinction would have been sufficient to preserve their federalism values had Chief Justice Roberts agreed with their interpretation of the statute.

But note that this is so only because of the way in which the statute was drafted. Suppose that Congress had denominated the “penalty” as a “tax” throughout the statute, and had made it clear that failure to purchase insur-

409 *Id.* at 72–73.

410 *Id.* at 73. “Those who would contend that the child labor tax was constitutional must either rely on arguments that offend common sense or else insist that the court can never go behind form to substance . . .” *Id.* at 71.

411 *Id.* at 69. After the Court’s decision, however, “protective labor legislation cannot be introduced into an excise law without getting discovered.” *Id.* at 79.

412 *Id.* at 81. Therefore, “[n]o valid criticism against it can be premised on the difficulties it engenders in passing on more difficult issues in the future.” *Id.*

ance was not itself illegal. The regulatory effect of the provision would have been identical, but because of its formulation as a tax on conduct in which individuals were legally free to engage or not to engage, the imposition would have been clearly constitutional under the rule-like test embraced by the dissenters. As the dissenting Justices conceded, “[t]he issue is not whether Congress had the *power* to frame the minimum coverage provision as a tax, but whether it *did* so.”⁴¹³ But such unfavorable facts could easily be avoided through careful drafting, and the sort of standard championed by Taft and Powell is far better suited to preventing Congress from exercising extensive regulatory authority through its taxing power.⁴¹⁴ Such a standard of course has the usual disadvantages of standards—greater uncertainty of application and less constrained judicial discretion than one associates with rules⁴¹⁵—and judges who generally favor rules over standards for these reasons⁴¹⁶ may be disinclined to adopt and reinvigorate it. But as Powell argued long ago, that may be the cost of preserving the values of federalism.

VI. APPLICATION TO THE ACA

A. *The Burden of the Exaction*

Chief Justice Roberts did not regard the ACA’s shared responsibility payment as imposing a heavy burden on the taxpayer. He observed that “for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more.”⁴¹⁷

In 2016, for example, individuals making \$35,000 [per] year [were] expected to owe the IRS about \$60 for any month in which they [did] not

413 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

414 Powell was concerned that even this standard might be too easily evaded. He thought it might ultimately be necessary to overrule *McCray*, because

[o]f the statute there involved it could be said with a large degree of truth, as Chief Justice Taft said of the child labor statute, that “it provides a heavy exaction for a departure from a detailed and specified course of conduct in business.” The details of the specification were less numerous than those of the child labor law, since they were confined to the kind of product and its complexion. Yet we may be confident that a new child labor tax would fail although it adopted the simple test of articles made or mined where children under sixteen were employed. If Congress seeks to defy the principle underlying the Child Labor Case, the court can keep the principle effective only by ceasing to distinguish between many details and few. It may be said of every tax that it provides an exaction for a departure from a specified course of business.

Powell, *supra* note 269, at 78. Under *McCray*, Powell believed, the only “shield against arbitrary exactions or unreasonable discrimination”—such as might be imposed by “a special excise on divorcees or law teachers”—was the Fifth Amendment. *Id.* at 79.

415 See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688–89 (1976).

416 See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181–82 (1989).

417 *Sebelius*, 132 S. Ct. at 2595–96.

have health insurance . . . [, while those] with an annual income of \$100,000 . . . [were] likely [to] owe [around] \$200 [for any such month]. The price of a qualifying [individual] insurance policy[, by contrast, was] projected to be around \$400 per month.⁴¹⁸

Indeed, it was estimated by the Congressional Budget Office (CBO) that 3.9 million people⁴¹⁹ each year would “choose to pay the IRS rather than buy insurance.”⁴²⁰ Thus, the Chief Justice concluded, “[i]t may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the ‘prohibitory’ financial punishment” imposed by the Child Labor Tax.⁴²¹

For the reasons noted above, the Chief Justice may have overestimated the “prohibitory” character of the Child Labor Tax. But he may also have underestimated the extent to which the shared responsibility payment could be expected to induce taxpayers to purchase qualifying insurance. This is easiest to see for those who would pay the maximum assessment, which is equivalent to the national average premium amount for qualifying insurance—hypothesized by the Internal Revenue Service for purposes of illustration to be \$20,000 for a family policy in 2016.⁴²² In the case of employing child labor or manufacturing colored oleomargarine, for example, a law-abiding rational taxpayer weighs the benefits of engaging in the enterprise against the tax costs of doing so. The fact that these taxes yielded revenue—in some cases significant revenue⁴²³—suggests that in these instances some individuals found it to be a reasonable financial decision to pay the tax rather than to desist from the taxed conduct. In the case of the individual paying the maximum assessment, however, it is difficult to see how it would be rational to pay the tax. A law-abiding taxpayer could pay \$20,000 to an insurance company and in exchange receive minimum essential coverage, or he could make the payment to the government and receive nothing in return. Unless the transaction costs involved in securing a qualifying policy approach

418 *Id.* at 2596 n.8.

419 CONG. BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 3 (Apr. 30, 2010), *available at* http://cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/individual_mandate_penalties-04-30.pdf.

420 *Sebelius*, 132 S. Ct. at 2597.

421 *Id.* at 2596 (citation omitted).

422 26 U.S.C. § 5000A(c) (Supp. V 2011); Dep’t of Treasury, Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, REG-148500-12, at 70 (proposed 2013) (to be codified at 26 C.F.R. pt. 1), *available at* <http://www.irs.gov/PUP/newsroom/REG-148500-12%20FR.pdf> (last visited Oct. 17, 2013). At the time of the decision, a leading expert estimated that the amount would be \$15,000. Interview with Timothy Jost, Law Professor, Wash. and Lee Univ. (June 29, 2012), *available at* <http://www.npr.org/2012/06/29/156005219/how-health-laws-taxes-penalties-will-be-enforced>.

423 To take just one example, in 1920 the tax on colored oleomargarine raised \$1,194,720.17. 1920 ANNUAL REPORT, *supra* note 278, at 23; *cf.* Cooter & Siegel, *supra* note 25, at 1211 (stating that in *McCray*, “[t]he Court was unconcerned that the exaction would raise negligible revenue”).

those of the tax assessment itself, which does not seem likely, it would not appear probable that a law-abiding rational actor would choose to pay the maximum assessment rather than securing minimum essential coverage. Of course, not everyone subject to the tax would pay the maximum assessment. Others will pay some lesser amount, equivalent to approximately 2.5% of their income.⁴²⁴ But even among this group there will be some significant number of people for whom refusing to purchase insurance and paying the tax will not be the rational course of action.

We can see this if we evaluate the CBO's projection that 3.9 million people would elect to pay the tax rather than purchase qualifying insurance in light of the number of people that the individual mandate may be expected to induce to acquire such insurance. In March of 2012, an Urban Institute study funded by the Robert Wood Johnson Foundation estimated that, under the ACA, "[a]bout 26.3 million Americans who are currently uninsured will be required to newly obtain coverage or pay a fine. In this group, 8.1 million people will be eligible to receive free or close-to-free insurance through Medicaid or CHIP and can avoid the mandate penalties if they do so."⁴²⁵ (The extent to which this will still be the case in view of the Court's ruling on the ACA's Medicaid expansion provisions remains to be seen.) Thus, the authors concluded that "18.2 million Americans . . . will be required to newly purchase coverage or face a penalty."⁴²⁶ "Of that 18.2 million, 10.9 million people will be eligible to receive subsidies toward private insurance premiums in the newly established health insurance exchanges, but will have to make partial contributions toward their coverage."⁴²⁷ And "[a]bout 7.3 million people . . . are not offered any financial assistance under the ACA and will be subject to penalties if they do not obtain coverage."⁴²⁸

The CBO's estimate of the number of people who will pay the tax rather than buy insurance has been modified since the Court's decision was handed down, and depending on future fluctuations in economic conditions, it may change again.⁴²⁹ But let us take the data as they existed at the time the Court

424 CONG. BUDGET OFFICE, *supra* note 419, at 1.

425 Linda J. Blumberg et al., *The Individual Mandate in Perspective: Timely Analysis of Immediate Health Policy Issues*, URBAN INST, Mar. 2012 at 1, available at <http://www.urban.org/UploadedPDF/412533-the-individual-mandate.pdf>.

426 *Id.* at 1–2.

427 *Id.* at 2.

428 *Id.*

429 In September of 2012, the CBO published a revised estimate projecting that 5.9 million persons would pay the penalty. CONG. BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT 2 (Sept. 19, 2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/09-19-12-Indiv_Mandate_Penalty.pdf. Most of the increase was attributable to "changes in CBO and JCT's baseline projections since April 2010, including the effects of legislation enacted since that time, changes in the economic outlook (primarily a higher unemployment rate and lower wages and salaries), and other technical updates." *Id.* at 1. About 15% of the increase was attributed to the Court's ruling on the Medicaid expansion provisions of the ACA. The CBO and JCT anticipated that as a result of that ruling some states would not expand Medicaid coverage

was deciding the question of whether the shared responsibility payment was a tax or a penalty. Those, after all, were the data that were either known by or could be made known to the Justices. Therefore, let us assume that the CBO's projection of 3.9 million people making the shared responsibility payment was accurate at the time. If we also assume that the Urban Institute study's projections were accurate, then up to 14.3 million people—76% of the 18.2 million potentially subject to the assessment—could be expected to be induced either by the tax alone or by the tax in combination with subsidies of various amounts to acquire insurance that they would not otherwise have purchased. Moreover, the CBO estimated that 1.4 million people whose incomes place them above the eligibility threshold for subsidies will pay the tax.⁴³⁰ This suggested that up to 5.9 million people—81% of the 7.3 million people in this category—might acquire minimum essential coverage rather than pay the tax. Of course, both of these percentages could be somewhat lower, as some unknown number of people may seek to avoid both obtaining insurance and paying the tax. But these numbers suggested the possibility that a substantial percentage of potential payers of the tax would be induced by the assessment to acquire minimum essential coverage. What Chief Justice Roberts might have made of these figures had they been presented by the litigants we do not know. But if these figures were even remotely accurate, it seems far from obvious that the ACA does not promise to impose—to use Powell's formulation—“a tax sufficiently onerous to induce them generally to alter the conduct of their business.”⁴³¹

B. *Departure from a Detailed and Specified Course of Conduct*

Chief Justice Roberts characterized the shared responsibility payment as one that “makes going without insurance just another thing the Government taxes, like buying gasoline or earning income.”⁴³² This formulation makes the tax sound rather simple, like a tax on coloring oleomargarine, or taking bets, or selling opium. The Court has consistently upheld such simple taxes, even where the exaction was onerous. It is only where the exaction was coupled with a detailed and specified course of conduct, as in the *Child Labor Tax Case*, that the Court has held the exaction to be a penalty rather than a true tax. The question, therefore, is whether the exaction imposed by the ACA is contingent on departure from a detailed and specified course of conduct.

It is certainly possible to see it that way. After 2013, the ACA will require that all “applicable individuals” who do not maintain “minimum essential coverage” for themselves and their dependents pay the assessment imposed

“to the full extent authorized by the ACA,” and that this would increase the “number of uninsured” persons “subject to the penalty.” *Id.* at 1–2.

430 CONG. BUDGET OFFICE, *supra* note 419, at 2. The CBO's more recent estimate raises this number to 1.8 million. CONG. BUDGET OFFICE, *supra* note 429, at 2.

431 Powell, *supra* note 373, at 291–92.

432 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012).

by the Act.⁴³³ An individual can satisfy the requirement to maintain minimum essential coverage in one of five ways: through (1) any government-sponsored health plan such as Medicare Part A, Medicaid, TRICARE, or CHIP; (2) any “eligible employer-sponsored plan;” (3) any health plan “in the individual market;” (4) any grandfathered health plan; or (5) “[s]uch other health benefits coverage” as may be recognized by the Secretary of Health and Human Services, in coordination with the Secretary.⁴³⁴

Thus, if one does not have an employer-sponsored or grandfathered plan, or does not qualify for a government-funded plan, one must secure minimum essential coverage through a purchase in the individual market. Individuals satisfying the mandate through acquisition in the individual market may do so either through the Exchanges contemplated by the Act or by purchasing directly from issuers.⁴³⁵

The individual market is in turn extensively regulated in a detailed and specified manner by the Act. 42 U.S.C. § 300gg-6(a) provides that “[a] health insurance issuer that offers health insurance coverage in the individual or small group market shall ensure that such coverage includes the essential health benefits package required under § 18022(a) of this title.”⁴³⁶ 42 U.S.C. § 18021(a)(1)(B) imposes the same requirement on all qualified health plans sold on the Exchanges.⁴³⁷ Section 18022(a) defines the term “essential health benefits package” to mean, “with respect to any health plan, coverage that—(1) provides for the essential health benefits defined by the Secretary [of Health and Human Services] under subsection (b).”⁴³⁸ Subsection (b) of § 18022 provides that

the Secretary shall define the essential health benefits, except that such benefits shall include at least the following [ten] general categories and the items and services covered within the categories: (A) Ambulatory patient services[;] (B) Emergency services[;] (C) Hospitalization[;] (D) Maternity and newborn care[;] (E) Mental health and substance use disorder services, including behavioral health treatment[;] (F) Prescription drugs[;] (G) Rehabilitative and habilitative services and devices[;] (H) Laboratory services[;] (I) Preventive and wellness services and chronic disease management[;] (J) Pediatric services, including oral and vision care.⁴³⁹

The section also provides further guidance for the Secretary in determining the content of and balance among each of these ten categories of services.⁴⁴⁰ Thus, as Judge Martin explained for the Sixth Circuit in *Thomas More*,

433 26 U.S.C. §§ 5000A(a)–(b)(1) (Supp. V 2011).

434 *Id.* §§ 5000A(f)(1)(A)–(E).

435 *Id.* § 5000A(e)(1)(B).

436 42 U.S.C. § 300gg-6(a) (Supp. V 2011).

437 *Id.* § 18021(a)(1)(B).

438 *Id.* § 18022 (a)(1).

439 *Id.* § 18022(b)(1).

440 *Id.* §§ 18022(b)(2), (b)(4).

the Act's 'Requirement to Maintain Minimum Essential Coverage' . . . requires every 'applicable individual' to obtain 'minimum essential coverage' for each month. The Act directs the Secretary of Health and Human Services in coordination with the Secretary of the Treasury to define the required essential health benefits, which must include at least ten general categories of services.⁴⁴¹

"Applicable individuals who fail to obtain minimum essential coverage must include with their annual federal tax payment a 'shared responsibility payment,' which is a 'penalty' calculated based on household income."⁴⁴² The Act thus may appear only to tax the failure to "buy health insurance," but it structures the health insurance market in such a detailed and specified way that the failure to acquire minimum essential coverage can be viewed as a departure from a detailed and specified course of conduct.

To see the point, imagine that the Act had permitted insurers to offer plans covering only one or more of the ten general categories of services listed above. Suppose further that the Act had imposed no tax on an applicable individual acquiring a policy with all ten forms of coverage, but had imposed a graduated tax on individuals acquiring policies with fewer than all ten. Thus, suppose that a person with dependents would pay a maximum tax of \$2,000 for acquiring a family policy with nine of the ten services, \$4,000 for acquiring a policy with eight of the ten, and so on, up to a maximum of \$20,000 for failure to acquire a policy with any of the ten forms of coverage. It would appear that in each instance the tax would be imposed for departure from a detailed and specified course of conduct, whether the individual acquired a policy with nine of the forms of coverage or acquired no health care policy at all. If the failure to acquire a health care policy under these circumstances can be seen as a departure from a detailed and specified course of conduct, then it can be seen as such a departure when the government has constructed the market so that the only options are to purchase all ten forms of coverage or none at all.

To see the point in a different way, imagine that an insurer, in violation of the law, were to offer for sale a health insurance policy containing fewer than the requisite ten essential health benefits, and a consumer were to purchase the policy. The consumer would have bought "health insurance," but it is not clear that she thereby would have acquired "minimum essential coverage" on the "individual market," and thus she may be liable for the shared responsibility payment. In order to avoid the liability, the consumer purchasing on the "individual market" may have to acquire a policy containing each of the ten forms of coverage comprising "essential health benefits." Failure to do so may constitute failure to acquire "minimum essential coverage." Departure from this detailed and specified course of conduct thus would trigger the imposition of liability.

441 Thomas More Law Ctr. v. Obama, 651 F.3d 529, 534–35 (6th Cir. 2011) (citing 42 U.S.C. § 18022(b)(1)).

442 *Id.* at 535 (citing 26 U.S.C. § 5000A(b), (c) (Supp. V 2011)).

If the understandings of Powell and his contemporaries in Congress and in the child labor reform community were correct, then, there is an argument to be made that the shared responsibility payment of the ACA would not have been a tax within the meaning of the *Child Labor Tax Case*. If that conclusion is correct, then the ACA's mandate would not have been a tax even if the statute had denominated it as a tax rather than a penalty, even if Congress had expressly invoked its taxing power and professed an objective to raise revenue, and even if the statute had conferred upon the IRS the power to enforce the tax through liens, levies, and criminal prosecution. The payment would be treated as a penalty rather than a tax because it imposed a sufficiently onerous exaction on a departure from a highly detailed and specified course of conduct. Of course, one cannot be certain how the Chief Justice might have ruled in a case involving an as-applied challenge brought by a taxpayer charged with the maximum shared responsibility payment. It is conceivable that he may have viewed such an exaction as sufficiently onerous to constitute a penalty rather than a tax. But if the understanding that I have outlined is correct, then the Roberts Court may well have tacitly overruled the *Child Labor Tax Case* and its progeny.

VII. A LOST GENERATION OF FEDERAL CHILD LABOR REFORM?

There is, however, another alternative to consider, although it is one that I regard as considerably less likely. It may be that Powell and his many contemporaries misread the Child Labor Tax decision, and that a revised measure eliminating one or more of the distinguishing features identified by Chief Justice Roberts would have been upheld by the Taft Court of the 1920s. If that is so, then that generation of child labor reformers made a very costly strategic error—for the overwhelming support that the Child Labor Amendment enjoyed in both houses of Congress⁴⁴³ and from a variety of political and social leaders and organizations had left its supporters overly confident about the prospects for ratification.⁴⁴⁴ The amendment quickly encountered determined opposition from a variety of powerful and well-organized groups,⁴⁴⁵ and by the end of 1925, only four states had ratified the Child

443 The amendment was approved in the House by a vote of 297–69, 65 CONG. REC. 7295 (1924), and in the Senate by a vote of 61–23, *id.* at 10,142.

444 KYVIC, *supra* note 317, at 257–58. For a list of supporters, see 66 CONG. REC. 5144–45 (1925). For a collection of statements in support, see *id.* at 5146–57.

445 These included the National Association of Manufacturers, which organized a National Committee for Rejection of the 20th Amendment; Southern textile manufacturers, led by David Clark, the editor of the *Southern Textile Bulletin*; newspaper publishers, who employed young boys in their sales and delivery operations; the American Farm Bureau Federation, the Grange, and other farm organizations and agricultural journals; the Woman Patriots; the American Constitutional League; the Sentinels of the Republic, whose membership included Everett P. Wheeler, former Assistant Treasury Secretary Louis A. Coolidge, and Columbia University President Nicholas Murray Butler; former Attorney General George W. Wickersham; President Sidney E. Mezes of New York's City College; President Emeritus Arthur T. Hadley of Yale; U.S. Circuit Judge Henry Galbraith Ward; Episcopal Bishop William Lawrence of Massachusetts; Episcopal Bishop Arthur S. Lloyd of

Labor Amendment, while it had been rejected by one or both houses of the legislatures of nineteen states.⁴⁴⁶ By 1932, the number of ratifications would

New York; civil rights leader Moorfield Storey; Harvard President A. Lawrence Lowell; Boston Mayor James Michael Curley; and Cardinal William O'Connell of Boston. See CHAMBERS, *supra* note 275, at 40–46; KYVIC, *supra* note 317, at 258–60; *Child Labor Amendment*, 57 CHI. LEGAL NEWS 205, 205–06 (1925); Richard B. Sherman, *The Rejection of the Child Labor Amendment*, 45 MID-AM. 3, 10–13 (1963); see also ALBION GUILFORD TAYLOR, *LABOR POLICIES OF THE NATIONAL ASSOCIATION OF MANUFACTURERS* 130–35 (1928); PROC. OF THE TWENTY-NINTH ANN. CONVENTION OF THE NAT'L ASSOC. OF MFRS. 215 (1924); PROC. OF THE THIRTIETH ANN. CONVENTION OF THE NAT'L ASSOC. OF MFRS. 47–49 (1925); PROC. OF THE THIRTY-FIRST ANN. CONVENTION OF THE NAT'L ASSOC. OF MFRS. 319 (1926); *Catholics and Child Labor*, 120 THE NATION 59, 59 (1925) (criticizing Cardinal O'Connell for speaking out about the Child Labor Amendment); Frank W. Grinnell, *The So-Called "Child Labor" Amendment*, 11 VA. L. REV. 121, 121–22 (1924); Hubert C. Herring, *The Shame of Massachusetts*, 41 CHRISTIAN CENTURY 1594, 1594–95 (1924); W.A. Robinson, *Advisory Referendum in Massachusetts on the Child Labor Amendment*, 19 AM. POL. SCI. REV. 69, 70–71 (1925); *The Child Labor Amendment*, 9 CONST. REV. 44, 45–48 (1925); *Ban on Child Labor Opposed by Grange*, N.Y. TIMES, Nov. 22, 1924, at 20 (noting that the Grange "voted unanimously in opposition to the proposed constitutional amendment prohibiting child labor" due to concerns about centralization and "bureaucratic control"). A more comprehensive list of opponents, consisting of both individuals and organizations, may be found at 66 CONG. REC. 2571–73 (1925), and at NAT'L CHILD LABOR COMM., *HANDBOOK ON THE FEDERAL CHILD LABOR AMENDMENT* 36–43 (1937). Additional expressions of opposition may be found at 66 CONG. REC. 1861–63, 2568–70, 3210–14, 3350–54 (1925), and 67 CONG. REC. 245–47 (1925).

446 ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 103 (1987). Critics charged that the authority conferred by the amendment was too broad and would enable Congress to regulate chores performed in the home and on the farm; that it set the age limit too high at eighteen; and that it represented and foretold unacceptable centralization of authority and bureaucratization of everyday life. See A. Piatt Andrew, *The Growing Menace of Overcentralization*, 9 MASS. L.Q., Aug. 1924, at 63, 65–68 (emphasizing states' rights and concerns about centralization); Geo. Stewart Brown, *Correspondence*, 97 CENT. L.J. 322, 322 (1924) (arguing that the authority conferred by the amendment was too broad); Nicholas Murray Butler, *The New American Revolution*, 10 A.B.A. J. 845, 849 (1924) (arguing that the authority conferred by the amendment was too broad, and urging that child labor be dealt with by state-level action); Thomas F. Cadwalader, *The Proposed Twentieth Amendment*, 8 CONST. REV. 212, 213–14 (1924) (arguing that the authority conferred by the amendment was too broad and expressing concerns about centralization); A.C. Campbell, *The Child Labor Amendment*, 60 AM. L. REV. 254, 259–260 (1926); *The Child Labor Amendment*, *supra* note 445, at 47–49 (emphasizing states' rights and concerns about centralization); *Defeat of the Child Labor Amendment*, 9 CONST. REV. 126, 127 (1925) (arguing that the authority conferred by the amendment was too broad); Grinnell, *supra* note 445, at 121–22 (arguing that the authority conferred by the amendment was too broad); Joseph Lee, *Child Labor and Local Responsibility*, 10 MASS. L.Q., Nov. 1924, at 80, 80–81 (emphasizing states' rights and concerns about centralization); Iredell Meares, *Should the Nation Control Child Labor?*, 57 CHI. LEGAL NEWS 156, 156, 158–159 (1924) (arguing that the authority conferred by the amendment was too broad, and that state-level action was adequate); *Second Thought on the Child Labor Amendment*, 9 MASS. L.Q., July 1924, at 15, 15–21 (arguing that the authority conferred by the amendment was too broad and expressing concerns about centralization); W.A. Shumaker, *The 20th Amendment*, 28 L. NOTES 185, 185–87 (1925) (urging against state adoption of the Uniform Child Labor Act); Edmund F. Tra-

grow only to six of the necessary thirty-six, while the list of rejections would grow to thirty-eight.⁴⁴⁷ The year 1933 witnessed renewed interest in the proposed amendment, and by early 1937 a number of states had changed their minds and a total of twenty-eight had ratified.⁴⁴⁸ But defeats in New York and Rhode Island later that year,⁴⁴⁹ along with passage of the Fair Labor Standards Act (FLSA), took the steam out of the movement.

That Act, which prohibited interstate shipment of goods produced by firms employing children, was regarded by many child labor reformers as offering at best half a loaf. Because the statute reached only firms producing for an interstate market, it covered only about six percent of the 850,000 children then gainfully employed in the United States, and only about a quarter of those working in non-agricultural occupations.⁴⁵⁰ The Act did not cover children working in commercial agriculture, in stores or offices, in hotels or restaurants or service stations; delivering messages or packages; or selling newspapers or other items on the street.⁴⁵¹ Indeed, under the understanding of the Commerce Clause that prevailed at the time, workers engaged in such "local" occupations could not have been reached by a statute exercising the commerce power of Congress.⁴⁵² But because no such

bue, *The Proposed Twentieth Amendment to the Federal Constitution—A Vicious Step Toward Centralization of Power*, 61 AM. L. REV. 205, 205–06 (1927) (emphasizing states' rights and concerns about centralization); Bentley W. Warren, *The Proposed Child Labor Amendment; Its Implications and Consequences*, 11 VA. L. REV. 1, 10–13, 17–18 (1924) (arguing that the authority conferred by the amendment was too broad, and expressing concerns about centralization); Everett P. Wheeler, *General Welfare and the Rights of Individuals*, 97 CENT. L.J. 318, 319–20 (1924) (arguing that the authority conferred by the amendment was too vast); Ira Jewell Williams, *The Child Labor Amendment*, 28 L. NOTES 179 (1924) (emphasizing states' rights and concerns about centralization); Ira Jewell Williams, *The Child Labor Amendment*, 11 A.B.A. J. 132, 132 (1925) (same); see also JAMES A. EMERY, AN EXAMINATION OF THE PROPOSED TWENTIETH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 11–20 (1924) (arguing that the amendment was unnecessary and that the authority conferred by the amendment was too broad); *The Child Labor Amendment*, *supra* note 445, at 205–06 (collecting public statements favoring and opposing ratification); *More About the So-Called Child Labor Amendment*, 9 MASS. L.Q., Aug 1924, at 52, 52–62 (printing four pieces, two in favor of the amendment and two opposed). Prelates of the Roman Catholic Church also voiced concerns that the measure would authorize congressional intervention in family life and parochial education, and alerted parishioners to the Church's opposition to the amendment. CHAMBERS, *supra* 275, at 40–42; KYVIC, *supra* note 317, at 260; TRATTNER, *supra* note 275, at 171–72, 175–76; *Catholics and Child Labor*, *supra* note 445, at 59; Grinnell, *supra* note 445, at 121–22; Herring, *supra* note 445, at 1594–95; Robinson, *supra* note 445, at 71; Sherman, *supra* note 445, at 13; *The Child Labor Amendment*, *supra* note 436.

447 KYVIC, *supra* note 317, at 307.

448 See GRIMES, *supra* note 446, at 103–04; KYVIC, *supra* note 317, at 308–09; TRATTNER, *supra* note 275, at 189–90, 200–02.

449 TRATTNER, *supra* note 275, at 202.

450 *Id.* at 207.

451 *Id.* at 205, 207.

452 The FLSA, which was drafted with these limits in mind, was later construed by the Roosevelt Court not to apply to local Western Union messengers, see *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 504–07 (1945); not to apply to a cook who prepared and served

connection of the child's work to interstate commerce would have been necessary had the statute been formulated as an exercise of the taxing power, a measure grounded in that authority might have reached and thereby reduced or eliminated child labor that was beyond the scope of the FLSA. Yet child labor reformers did not revisit that possibility, and instead persisted in their pursuit of the eight remaining necessary ratifications. In this pursuit they were to be disappointed: no additional states ever purported to ratify the amendment.⁴⁵³ Subsequent decisions expanding the scope of the commerce power would make it possible to regulate the employment of children in an increasing number of these occupations. But Chief Justice Roberts's analysis suggests the possibility that, for at least two decades, leaders of the movement for federal child labor reform overlooked a constitutionally viable taxing power alternative that could have significantly reduced the employment of children in the United States.

CONCLUSION

Sebelius clearly resuscitated the Progressive-Era asymmetry between the respective scopes of the commerce and taxing powers. Yet the decision leaves murky the future contours of a taxing power jurisprudence that is likely to become increasingly important. Chief Justice Roberts's opinion offers assurances that "Congress's ability to use its taxing power to influence conduct is not without limits,"⁴⁵⁴ but beyond the restrictions imposed by the Bill of Rights, it is not clear exactly what those limits might be. After noting that in its more recent cases the Court has "declined to closely examine the regulatory motive or effect of revenue-raising measures," the Chief Justice reasserts Taft's *Child Labor Tax Case* principle that "'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'"⁴⁵⁵ Because the Chief Justice concluded that the ACA's shared responsibility payment "pass[ed] muster as a tax under our narrowest interpretations of the taxing power," he deemed it unnecessary to "decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it."⁴⁵⁶ He insisted, however, that "the 'power to tax is not the power to destroy while this Court sits.'"⁴⁵⁷

meals to maintenance-of-way employees of an interstate railroad pursuant to a contract between his employer and the railroad company, see *McLeod v. Threlkeld*, 319 U.S. 491, 497–98 (1943); and not to apply to maintenance employees of a metropolitan office building, operated as an independent enterprise, which was to be used by a wide variety of tenants, including some producers of goods for interstate commerce, 10 E. 40th St. Bldg., Inc., v. Callus, 325 U.S. 578, 584 (1945).

453 TRATTNER, *supra* note 275, at 208.

454 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

455 *Id.* (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1994)).

456 *Id.* at 2600.

457 *Id.* (quoting Okla. Tax Comm'n v. Tex. Co., 336 U.S. 342, 364 (1949)).

This Article has endeavored to articulate reasons to question the contention that the shared responsibility payment actually does pass muster under the Court's "narrowest interpretations of the taxing power," even when given the benefit of a "saving construction." Whether the Chief Justice would have seen the matter differently had such reasons been presented to the Court is a matter about which we can only speculate. But it does appear likely that one of two things is true: either the Court has effectively abandoned the principle established in the *Child Labor Tax Case* and its progeny, or child protection advocates of the interwar period were badly mistaken in their assessment of that decision, at the cost of a lost generation of federal child labor reform.